No. 05-409

Title:	Carl Kircher, et al., Petitioners v. Putnam Funds Trust, et al.
Docketed:	September 30, 2005
Lower Ct:	United States Court of Appeals for the Seventh Circuit
Case Nos.:	(04-1495, 04-1496, 04-1608, 04-1628, 04-1650, 04-1651, 04-1660, 04-1661, 04-2162, 04-2687)
Decision Date:	April 5, 2005
Rehearing Denied:	May 2, 2005

Questions Presented

~~Date~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~
Jul 20 2005	Application (05A73) to extend the time to file a petition for a writ of certiorari from July 31, 2005 to August 30, 2005, submitted to Justice Stevens.
Jul 22 2005	Application (05A73) granted by Justice Stevens extending the time to file until August 30, 2005.
Aug 19 2005	Application (05A73) to extend further the time from August 30, 2005 to September 29, 2005, submitted to Justice Stevens.
Aug 26 2005	Application (05A73) granted by Justice Stevens extending the time to file until September 29, 2005.
Sep 29 2005	Petition for a writ of certiorari filed. (Response due October 31, 2005)
Oct 25 2005	Order extending time to file response to petition to and including November 29, 2005, for all respondents.
Nov 28 2005	Brief amici curiae of Arthur R. Miller and E. Farish Percy filed.
Nov 29 2005	Brief of respondents Putnam Funds Trust, et al. in opposition filed.
Dec 13 2005	Reply of petitioners Carl Kircher, et al. filed.
Dec 14 2005	DISTRIBUTED for Conference of January 6, 2006.
Jan 6 2006	Petition GRANTED limited to Question one presented by the petition.
Feb 21 2006	Joint appendix filed. (Jt. appendix in two volumes).
Feb 21 2006	Brief of petitioners Carl Kircher, et al. filed.
Feb 21 2006	Brief amici curiae of Law Professors Arthur R. Miller, E. Farish Percy, Michael E. Solimine, and Jill E. Fisch filed.
Mar 6 2006	SET FOR ARGUMENT on Monday, April, 24 2006.
Mar 21 2006	Record received from U.S.C.A. for 7th Circuit. (1 envelope)
Mar 23 2006	CIRCULATED.
Mar 27 2006	Brief amicus curiae of Washington Legal Foundation filed. (Distributed)
Mar 27 2006	Record received from U.S.D.C for Southern District of Illinois. (1 box

	containing 13 volumes and 1 loose document)
Mar 28 2006	Brief of respondents Putnam Funds Trust, et al. filed. (Distributed)
Mar 28 2006	Brief amici curiae of Securities Industry Association and the Bond Market Association filed. (Distributed)
Mar 28 2006	Brief amicus curiae of Chamber of Commerce of the United States of America filed. (Distributed)
Apr 14 2006	Reply of petitioners Carl Kircher, et al. filed. (Distributed).
Apr 24 2006	Argued. For petitioners: David Frederick, Washington, D.C. For respondents: Mark A. Perry, Washington, D.C.

Supreme Court, U.S.
05-408 SEP 21 2005
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No. ____

IN THE

Supreme Court of the United States

CARL KIRCHER, ET AL.,
Petitioners,

v.

PUTNAM FUNDS TRUST, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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September 29, 2005

QUESTIONS PRESENTED

1. Whether the court of appeals had jurisdiction, contrary to the holdings of three other circuits, to review a district court order remanding for lack of subject-matter jurisdiction a suit removed under the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"), notwithstanding 28 U.S.C. § 1447(d)'s bar on appellate review of remand orders based on lack of subject-matter jurisdiction and the district courts' conclusion that petitioners' claims are not preempted by and thus not removable under SLUSA.

2. Whether the court of appeals erred in holding, in acknowledged conflict with three other circuits, that SLUSA preempts claims brought by holders of securities, notwithstanding SLUSA's language limiting preemption to claims "in connection with the purchase or sale of a covered security," and this Court's interpretation of identical language to cover only claims brought by purchasers or sellers in *Blue Chip Stamps, Inc. v. Manor Drug Stores*, 421 U.S. 723 (1975).

LIST OF PARTIES TO THE PROCEEDINGS

Petitioners Carl Kircher, Beth Dudley, Steve Dudley, Avery Jackson, Dorothy Leuttinger, T.K. Parthasarathy, Robert Potter, Terry Spurgeon, as Custodian for the Benefit of James E. Spurgeon, and Gary Vogeler were plaintiffs in the district court and appellees in the court of appeals.*

Robert Brockway, Sharon Smith, Stuart A. Smith, and Edmund Woodbury also were plaintiffs in the district court but did not participate in the court of appeals proceedings, and thus are not parties to the petition for a writ of certiorari.

The following were defendants in the district court and appellants in the court of appeals, and are respondents here:

Artisan Funds, Inc.

Artisan Partners Limited Partnership

Columbia Acorn Trust

Columbia Wanger Asset Management L.P.

Deutsche Investment Management Americas Inc.

Janus Capital Management LLC

Janus Investment Fund

Pacific Life Insurance Company

Putnam Funds Trust

Putnam International Equity Fund

Putnam Investment Funds

Putnam Investment Management, LLC

Scudder International Fund, Inc.

Van Kampen Investment Advisory Corporation

Van Kampen Series Fund, Inc.

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* Petitioners each filed suit as individuals and on behalf of all others similarly situated.

AIM Advisors, Inc., AIM International Funds, Inc., Evergreen International Trust, Evergreen Investment Management Company LLC, T. Rowe Price International Funds, Inc., T. Rowe Price International, Inc., Templeton Funds, Inc., Templeton Global Advisors Limited, Templeton Global Smaller Companies Fund, Inc., Templeton Growth Fund, Inc., and Templeton Investment Counsel LLC also were defendants in the district court but did not participate in the court of appeals proceedings, and thus are not parties to the petition for a writ of certiorari.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES TO THE PROCEEDINGS ii

TABLE OF AUTHORITIES vii

INTRODUCTION 1

OPINIONS BELOW 4

JURISDICTION 4

STATUTORY AND REGULATORY PROVISIONS INVOLVED 4

STATEMENT OF THE CASE:

A. The Statutory Framework 4

B. Petitioners' Common-Law Claims 5

C. Proceedings Below 9

REASONS FOR GRANTING THE PETITION:

I. THE COURT SHOULD GRANT CERTIORARI TO REVIEW THE SEVENTH CIRCUIT'S HOLDING THAT REMAND ORDERS UNDER SLUSA ARE SUBJECT TO APPELLATE REVIEW 13

A. The Seventh Circuit's Exercise Of Appellate Jurisdiction Squarely Conflicts With Decisions Of Three Other Circuits 13

1. Second Circuit – *Spielman* 14

2. Ninth Circuit – *Abada* 15

3. Eleventh Circuit – *Williams* 15

B. The Seventh Circuit's Exercise Of Appellate Jurisdiction Is Inconsistent With This Court's Precedents And The Language Of SLUSA 17

C. The Reviewability Of Remand Orders Under SLUSA Is An Issue of Great Importance Warranting This Court's Resolution 20

II. THIS COURT HAS GRANTED CERTIORARI IN *MERRILL LYNCH V. DABIT* TO DECIDE WHETHER SLUSA PREEMPTS CLAIMS BROUGHT BY HOLDERS OF SECURITIES 23

A. The Seventh Circuit's Decision That SLUSA Preempts Holder Claims Squarely Conflicts With The Decisions Of Three Other Circuits 24

1. Second Circuit – *Dabit* 24

2. Eighth Circuit – *Green* 26

3. Eleventh Circuit – *Riley* 26

B. The Seventh Circuit's Interpretation Of SLUSA's Preemptive Scope Is Contrary To This Court's *Blue Chip Stamps* Decision And Congressional Intent 27

C. Whether SLUSA Preempts Holder Claims Is An Issue Of Great Importance 29

CONCLUSION 30

APPENDIX

TABLE OF AUTHORITIES

Page

CASES

Abada v. Charles Schwab & Co., 300 F.3d 1112 (9th Cir. 2002) 2, 10, 15, 21

Bates v. Dow AgroSciences LLC, 125 S. Ct. 1788 (2005) 28, 29

Birnbaum v. Newport Steel Corp., 193 F.2d 461 (2d Cir. 1952).....27

Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975) 3, 12, 13, 24, 25, 26, 27, 28, 29

Bradfisch v. Templeton Funds, Inc., Case No. 03-CV-0760-MJR (S.D. Ill. Jan. 23, 2004) 9

Chick Kam Choo v. Exxon Corp., 486 U.S. 140 (1988).....19

Dabit v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 395 F.3d 25 (2d Cir. 2005), *cert. granted*, No. 04-1371 (U.S. Sept. 27, 2005).....3, 23, 24, 25, 26, 29, 30

Disher v. Citigroup Global Markets Inc., 419 F.3d 649 (7th Cir. 2005) 17, 20-21, 27

Gravitt v. Southwestern Bell Tel. Co., 430 U.S. 723 (1977) 17, 18

Green v. Ameritrade, Inc., 279 F.3d 590 (8th Cir. 2002) 3, 26

Kontrick v. Ryan, 124 S. Ct. 906 (2004) 19, 20, 21

Medtronic, Inc. v. Lohr, 518 U.S. 470 (1996) 28

Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit, No. 04-1371 (U.S. Sept. 27, 2005).....3, 23, 30

Riley v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 292 F.3d 1334 (11th Cir. 2002) 3, 16, 26, 27

Rowinski v. Salomon Smith Barney Inc., 398 F.3d 294 (3d Cir. 2005) 17

Scarborough v. Principi, 124 S. Ct. 1856 (2004) ..19, 20, 21

Silkwood v. Kerr-McGee Corp., 464 U.S. 238 (1984) 29

Spielman v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 332 F.3d 116 (2d Cir. 2003) 2, 10, 14, 15, 20, 21

Thermtron Products, Inc. v. Hermansdorfer, 423 U.S. 336 (1976) 21, 22

Things Remembered, Inc. v. Petrarca, 516 U.S. 124 (1995) 17, 18, 21

United Investors Life Ins. Co. v. Waddell & Reed Inc., 360 F.3d 960 (9th Cir. 2004).....2, 10, 15, 21

Williams v. AFC Enters., Inc., 389 F.3d 1185 (11th Cir. 2004) 2, 15, 16

STATUTES AND REGULATIONS

Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4.....22

§ 4(a)(2), 119 Stat. 11 (to be codified at 28 U.S.C. § 1332(d)(9)(A)) 22

§ 5(a):

119 Stat. 12 (to be codified at 28 U.S.C. § 1453(c)(1)) 22

119 Stat. 13 (to be codified at 28 U.S.C. § 1453(d)) 22

Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 4

Securities Act of 1933, 15 U.S.C. §§ 77a *et seq.* 5

15 U.S.C. § 77p(b) 2, 5, 9, 11, 16, 18, 19, 23

15 U.S.C. § 77p(c) 5, 9, 11, 18, 20, 23

15 U.S.C. § 77p(d)(4) 5, 19, 23

15 U.S.C. § 77p(f)(2)(A) 11

15 U.S.C. § 77z-1 4

Securities Exchange Act of 1934, 15 U.S.C. §§ 78a *et seq.* 5, 10, 12

§ 10(b), 15 U.S.C. § 78j(b) 3, 10, 12, 13, 24, 26, 27

§ 21, 15 U.S.C. § 78u 4

§ 28(f)(1), 15 U.S.C. § 78bb(f)(1) 5, 15

§ 28(f)(2), 15 U.S.C. § 78bb(f)(2) 5, 15

§ 28(f)(3)(D), 15 U.S.C. § 78bb(f)(3)(D) 5

Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, 112 Stat. 3227 2

15 U.S.C. § 80a-2(a)(41)(B)(ii) 6

28 U.S.C. § 1254(1) 4

28 U.S.C. § 1447(c) 10, 17

28 U.S.C. § 1447(d) 2, 10, 11, 13, 15, 16, 17, 20

17 C.F.R.:

§ 240.10b-5 (Rule 10b-5) 3, 12, 13, 24, 26, 27

§ 270.2a-4(a) 6

LEGISLATIVE MATERIALS

H.R. Conf. Rep. No. 105-803 (1998) 4

Mutual Funds – Trading Practices and Abuses that Harm Investors: Hearing Before the Subcomm. on Federal Financial Management, Government Information, and International Security of the Senate Comm. on Homeland Security and Governmental Affairs, 108th Cong. (Nov. 3, 2003) (Statement of New York Attorney General Eliot Spitzer, *available at* http://hsgac.senate.gov/_files/ACF1DE.pdf) 6-7

OTHER MATERIALS

Jennifer Barrett, "Inexcusable," MSNBC.com, Nov. 11, 2003, *available at* http://www.msnbc.com/id/3403565/site/newsweek.....29

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Investment Company Institute, Trading Abuse Reforms & Actions, *available at* http://www.ici.org/issues/timing.....7

Jennifer O'Hare, *Preemption under the Securities Litigation Uniform Standards Act: If It Looks Like a Securities Fraud Claim and Acts Like a Securities Fraud Claim, Is It a Securities Fraud Claim?*, 56 Ala. L. Rev. 325 (2004) 23

United States Government Accountability Office, *Mutual Fund Trading Abuses: Lessons Can Be Learned from SEC Not Having Detected Violations at an Earlier Stage* (Apr. 2005), *available at* http://www.gao.gov/new.items/d05313.pdf.....1, 7

Eric Zitzewitz, *Who Cares About Shareholders? Arbitrage-Proofing Mutual Funds*, 19 J.L. Econ. & Org. 245 (2003) 29

Carl Kircher, Beth Dudley, Steve Dudley, Avery Jackson, Dorothy Leuttinger, T.K. Parthasarathy, Robert Potter, Terry Spurgeon, as Custodian for the Benefit of James E. Spurgeon, and Gary Vogeler (collectively, "petitioners") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

INTRODUCTION

These eight consolidated cases involve two frequently litigated issues of securities law of vital importance to the administration of the federal courts and the investing community. The circuits are deeply divided on the jurisdictional and substantive questions presented. In the two opinions below, the Seventh Circuit created conflicts with four other circuits, leaving petitioners and investors like them without a remedy for a practice by arbitrageurs that costs investors an estimated $5 billion every year.[1]

Petitioners are long-term investors in international mutual funds. They sued respondent funds and their managers in state court, alleging that the funds negligently or recklessly failed to calculate share prices accurately and thereby exposed petitioners to an investment-diluting practice known as "stale price trading" or "market timing." That practice involves arbitrageurs trading on time differences between the closing of U.S. markets and foreign exchanges. It dilutes the value of investors' long-term holdings as well as their voting rights. Because market timing injures non-trading shareholders of mutual funds – not purchasers or sellers – petitioners sought to represent classes of individuals who held shares in funds that experienced market-timing activity.

The respondent mutual funds removed the lawsuits to federal district court and moved for dismissal under the

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[1] *See* United States Government Accountability Office, *Mutual Fund Trading Abuses: Lessons Can Be Learned from SEC Not Having Detected Violations at an Earlier Stage* 4-5 (Apr. 2005) ("GAO Report"), *available at* http://www.gao.gov/new.items/d05313.pdf.

Securities Litigation Uniform Standards Act of 1998 ("SLUSA"). Petitioners moved for remand based on lack of subject-matter jurisdiction. All of the district court judges in these eight consolidated cases concluded that SLUSA did not preempt petitioners' claims, because the claims were in connection with the retention or holding of securities, rather than "in connection with the purchase or sale of a covered security." 15 U.S.C. § 77p(b). The district judges further found that, because petitioners' claims were not preempted, they were also not removable under SLUSA and therefore had to be remanded to state court for lack of subject-matter jurisdiction.

On respondents' appeal of those remand orders, the Seventh Circuit issued two decisions that independently warrant certiorari. First, the court held that 28 U.S.C. § 1447(d), which precludes appellate review of remands based on a district court's conclusion that it lacked subject-matter jurisdiction, did not bar review of the orders in these cases. The Seventh Circuit rejected the district courts' characterization of their own orders as grounded on a lack of jurisdiction. *See* Pet. App. 10a-17a ("*Kircher I*"). In doing so, the Seventh Circuit acknowledged that it was creating a conflict with the Second and Ninth Circuits, which have held that § 1447(d) bars review of a district court's remand order under SLUSA. *See Spielman v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 332 F.3d 116 (2d Cir. 2003); *United Investors Life Ins. Co. v. Waddell & Reed Inc.*, 360 F.3d 960 (9th Cir. 2004); *Abada v. Charles Schwab & Co.*, 300 F.3d 1112 (9th Cir. 2002). Since the Seventh Circuit's decision on this remand issue, the Eleventh Circuit has rejected the approach adopted by the Seventh Circuit and has agreed with the Second and Ninth Circuits. *See Williams v. AFC Enters., Inc.*, 389 F.3d 1185 (11th Cir. 2004).

After concluding that it had appellate jurisdiction, the court then issued an opinion on the merits, where it again created a split, this time with the Second, Eighth, and Eleventh Circuits. Those circuits hold that SLUSA's pre-

emption provision – which preempts class-action securities fraud claims "in connection with the purchase or sale of a covered security" – does not apply to claims brought by *holders* of securities, as opposed to purchasers or sellers. *See Dabit v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 395 F.3d 25, 43 (2d Cir. 2005), *cert. granted*, No. 04-1371 (U.S. Sept. 27, 2005); *Riley v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 292 F.3d 1334 (11th Cir. 2002); *Green v. Ameritrade, Inc.*, 279 F.3d 590 (8th Cir. 2002). In those courts, the "in connection with" language of SLUSA has the same meaning as the nearly identical language in § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and its corresponding Rule 10b-5, 17 C.F.R. § 240.10b-5, which this Court has interpreted to cover only claims brought by purchasers or sellers. *See Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975). The Seventh Circuit, by contrast, concluded below that a class-action plaintiff need not be a purchaser or seller of securities for SLUSA to preempt his or her claims. *See* Pet. App. 1a-9a ("*Kircher II*"). Two days ago, this Court granted certiorari to resolve this issue in *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, No. 04-1371.

The Seventh Circuit's decision below not only created a conflict with three other circuits and countless district courts, but also completely extinguished an entire category of claims that have existed for more than 50 years and with this Court's blessing for the last 30. *See Blue Chip Stamps*, 421 U.S. at 739 n.9 (noting availability of "remedies . . . to nonpurchasers and nonsellers under state law"). Shareholders like petitioners who have no § 10(b) or Rule 10b-5 claim because they do not allege misconduct "in connection with" the purchase or sale of a security under those provisions are now simultaneously denied a cause of action under state law because their claims are deemed preempted under SLUSA as "in connection with" the purchase or sale of a security. The Seventh Circuit's holdings thus snuff out the claims of tens of millions of mutual fund investors who have collectively

suffered an annual multi-billion-dollar dilution in the value of their holdings from the funds' negligent and reckless practices. The Seventh Circuit's decision strips such investors of any direct private cause of action, on the theory that their "claims must be left to public enforcement." Pet. App. 8a.

OPINIONS BELOW

The district courts' opinions granting plaintiffs' motions to remand (Pet. App. 23a-64a) are unreported. The court of appeals' opinions finding appellate jurisdiction (*id.* at 10a-17a), and reversing and remanding the district courts' judgments with instructions to undo the remand orders and to dismiss plaintiffs' state-law claims (*id.* at 1a-9a), are reported at 373 F.3d 847 and 403 F.3d 478.

JURISDICTION

The court of appeals entered its judgment on April 5, 2005. A timely petition for rehearing was denied on May 2, 2005. Pet. App. 65a. On July 22, 2005, Justice Stevens extended the time for filing a petition for a writ of certiorari to and including August 30, 2005, *id.* at 143a, and, on August 26, 2005, further extended the time for filing to and including September 29, 2005, *id.* at 144a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Relevant statutory and regulatory provisions are set forth at Pet. App. 118a-142a.

STATEMENT OF THE CASE

A. The Statutory Framework

In 1995, Congress passed the Private Securities Litigation Reform Act ("PSLRA") (codified in part at 15 U.S.C. §§ 77z-1, 78u) to prevent "strike suits," or meritless class actions alleging fraud in the securities market. *See* H.R. Conf. Rep. No. 105-803, at 13 (1998). To deter those suits, the PSLRA imposes stringent pleading and other procedural requirements on securities class-action plaintiffs. To avoid the PSLRA's requirements, plaintiffs increas-

ingly brought suit against issuers in state court alleging securities fraud under state statutory or common law.

To prevent private plaintiffs from such alleged circumventions of the PSLRA, Congress passed SLUSA, which added to the Securities Act of 1933 ("1933 Act") and the Securities Exchange Act of 1934 ("1934 Act") identical provisions that preempt certain class actions under state law. Specifically, SLUSA's preemption provision states:

> No covered class action based upon the statutory or common law of any State or subdivision thereof may be maintained in any State or Federal court by any private party alleging –
>
> (1) an untrue statement or omission of a material fact in connection with the purchase or sale of a covered security; or
>
> (2) that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security.

15 U.S.C. § 77p(b); *accord id.* § 78bb(f)(1). SLUSA authorizes such actions to be removed to federal court:

> Any covered class action brought in any State court involving a covered security, as set forth in subsection (b) of this section, shall be removable to the Federal district court for the district in which the action is pending, and shall be subject to subsection (b).

Id. § 77p(c); *accord id.* § 78bb(f)(2). Following removal, if the district court determines that the action is not in fact within the scope of SLUSA's preemption provision, it must remand the action to state court. *See id.* §§ 77p(d)(4), 78bb(f)(3)(D).

B. Petitioners' Common-Law Claims

Petitioners are among the more than 90 million individual long-term investors whom the Federal Reserve estimates have more than $4 trillion in long-term savings invested in mutual funds with substantial holdings in

international stocks. *See* Financial Policy Forum, Special Policy Brief 13 – *Overview of Mutual Fund Scandal: "A Gauntlet of Fraud"* (Dec. 14, 2003; updated May 21, 2004), *available at* http://www.financialpolicy.org/fpfspb13.htm. The price at which one share of a mutual fund is sold and redeemed is equal to the value of the fund's portfolio of securities, known as the fund's net asset value ("NAV"), divided by the number of outstanding shares. The NAV is calculated once a day at 4:00 p.m. Eastern Time. When a fund holds assets that trade in competitive markets, it must value those assets at their market price. *See* 15 U.S.C. § 80a-2(a)(41)(B)(ii); 17 C.F.R. § 270.2a-4(a).

Respondents value their assets using the final closing price of the foreign security in its home market. For domestic securities, that method yields a current price. For securities of foreign issuers, however, the method produces prices that are up to 15 hours old and may no longer reflect the current value of the foreign security, causing mutual fund share prices to be either artificially high or artificially low. For example, if the United States market moves up following the close of Asian and European markets, investors can predict that foreign markets will move up once trading begins on their next trading day, and a share price based on foreign securities' final closing price will be artificially low. Or, as the Seventh Circuit explained below, "[s]tock of a Japanese firm that closes in Tokyo at ¥10,000 might trade in Frankfurt at € 75.22 (equivalent to ¥10,500) between the close in Tokyo and the close in New York – but the mutual fund nonetheless would value each share at ¥10,000, because that was its most recent price in the issuer's home market." *Kircher II*, Pet. App. 2a.

In early September 2003, New York Attorney General Eliot Spitzer announced that his office's investigation of the mutual fund industry "revealed that some of the nation's largest mutual fund companies permitted" a practice called "market timing." *Mutual Funds – Trading Practices and Abuses that Harm Investors: Hearing*

Before the Subcomm. on Federal Financial Management, Government Information, and International Security of the Senate Comm. on Homeland Security and Governmental Affairs, 108th Cong. (Nov. 3, 2003) (Statement of New York Attorney General Eliot Spitzer, *available at* http://hsgac.senate.gov/_files/ACF1DE.pdf). Market timers exploit the time differences between U.S. and foreign markets for short-swing profits. They do so by regularly purchasing and redeeming mutual fund shares on days when the foreign securities in the fund's portfolio are undervalued or overvalued, respectively. Studies have estimated that such trading costs non-trading shareholders like petitioners nearly $5 billion each year by diluting the value of their investments. *See* GAO Report at 4-5.

Every purchase of a mutual fund share at an artificially low price reduces the value of the investments of all existing, non-trading shareholders because the purchaser acquires a larger share of the fund than if the fund had calculated the NAV more accurately. Similarly, every redemption of a share at an artificially high price reduces the value of the investments of non-trading shareholders because the redemption depletes their pooled assets more than if the fund had not relied on stale prices. The mutual fund industry's main trade organization has conceded that "the discovery of trading abuses involving mutual funds . . . put at risk the reputation of the entire fund industry," "shook the industry to its core," and "triggered a degree of Congressional oversight of mutual funds rarely seen in the industry's history."[2]

Petitioners filed eight lawsuits in state court, charging that respondents used pricing methods negligently[3] or

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[2] Investment Company Institute, Trading Abuse Reforms & Actions, *available at* http://www.ici.org/issues/timing.

[3] *See* Pet. App. 69a (¶ 55) (Kircher), 74a, 76a (¶¶ 55, 68) (Potter), 81a (¶ 59) (Parthasarathy), 86a (¶ 53) (Dudley), 91a-92a (¶ 53) (Vogeler), 96a-97a (¶ 52) (Jackson), 109a-110a (¶ 53) (Spurgeon).

recklessly[4] in a way that exposed petitioners' investments to dilution from market timing. The complaints alleged that, because respondents should have known of the existence of market timing and of alternative pricing procedures that would prevent it, respondents breached their duties of care to petitioners and similarly situated owners or shareholders[5] of respondent funds.[6] For example, petitioners alleged that respondents failed to make pricing adjustments based on correlations between movements in the U.S. and foreign markets.[7]

Petitioners filed their claims as class actions on behalf of holders of the relevant securities: specifically, "all persons in the United States who have held shares of [the fund] for more than fourteen days from the date of purchase to the date of sale (redemption) or exchange."[8] The *Spurgeon* complaint took the additional step of explicitly excluding any claims based on purchase or sale. *See* Pet. App. 106a (¶ 39) (Spurgeon) (defining plaintiff class as "all persons in the United States who, through their ownership of [the fund's] products, held units of any [fund] sub-

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[4] *See* Pet. App. 70a (¶ 60) (Kircher), 75a, 76a-77a (¶¶ 60, 73) (Potter), 82a (¶ 64) (Parthasarathy), 86a-87a (¶ 54) (Dudley), 92a (¶ 54) (Vogeler), 97a (¶ 53) (Jackson), 111a (¶¶ 56-57) (Spurgeon).

[5] *See* Pet. App. 69a (¶ 56) (Kircher), 74a-77a (¶¶ 56, 60, 69, 73) (Potter), 81a-82a (¶¶ 60, 64) (Parthasarathy), 85a-86a (¶ 49) (Dudley), 91a (¶ 49) (Vogeler), 96a (¶ 49) (Jackson), 113a-114a (¶ 62) (Spurgeon) (breach of fiduciary duties).

[6] Petitioner Spurgeon also alleged violations of several provisions of the California Business & Profession Code (Count IV). *See* Pet. App. 115a-116a (¶¶ 67, 69, 73).

[7] *See* Pet. App. 66a-68a (¶¶ 17, 32-33) (Kircher), 71a-73a (¶¶ 17, 32-33) (Potter), 78a-80a (¶¶ 22, 37-38) (Parthasarathy), 83a-85a (¶¶ 13, 28-29) (Dudley), 88a-90a (¶¶ 13, 28-29) (Vogeler), 93a-95a (¶¶ 13, 28-29) (Jackson), 103a-104a (¶¶ 31-32) (Spurgeon).

[8] *See* Pet. App. 68a (¶ 41) (Kircher), 73a (¶ 41) (Potter), 80a (¶ 46) (Parthasarathy), 85a (¶ 37) (Dudley), 90a (¶ 37) (Vogeler), 95a (¶ 37) (Jackson) (omitting "from the date of purchase to the date of sale (redemption) or exchange").

account invested in mutual funds which included foreign securities in their portfolios and which experienced market timing trading activity"); *id.* (¶ 40) (excluding "from this Complaint . . . any claims based upon [the fund's] conduct in connection with Plaintiff's or any class member's purchase or sale of any [fund]" product or units). That exclusion is implicit in the other complaints, which assert negligence and recklessness claims that only non-trading shareholders possess. Only holders are injured by market-timing activity: while respondents' use of stale prices may cause a purchaser to buy a fund share at an artificially high price or a seller to redeem a fund share at an artificially low price, those losses do not depend on whether other individuals simultaneously engage in market timing.

C. Proceedings Below

In each case, the respondent fund removed to federal district court, arguing, *inter alia*, that the case fell within the district court's removal jurisdiction under SLUSA, *see* 15 U.S.C. § 77p(c), and that petitioners' claims were preempted by that Act, *see id.* § 77p(b). Petitioners moved to remand the cases to state court for lack of subject-matter jurisdiction. All three district judges to hear those motions agreed with petitioners that they lacked jurisdiction.

Specifically, the district judges found that petitioners' common-law claims were outside the scope of SLUSA's preemption provision because the claims were brought – indeed, could only be brought – by holders of securities, not purchasers or sellers. *See, e.g.*, Pet. App. 26a-27a (Kircher), 30a (Dudley) ("Only *holders* of fund shares have the dilution of ownership interests and voting rights claims asserted in the complaints."), 40a (Parthasarathy) (agreeing that the "'complaint alleges dilution claims that only a holder of securities can bring'") (quoting *Bradfisch v. Templeton Funds, Inc.*, Case No. 03-CV-0760-MJR, slip op. at 6 (S.D. Ill. Jan. 23, 2004)), 44a-45a (Potter) (same), 50a-51a (Vogeler) (same), 56a-57a (Jackson) (same). The district judges concluded that, because petitioners' claims

were not "in connection with the purchase or sale of a covered security," they were not cognizable under § 10(b) of the 1934 Act; were not preempted by the Act as amended by SLUSA; and were not removable under SLUSA. *See, e.g., id.* at 26a-27a (Kircher), 30a (Dudley), 39a-40a (Parthasarathy), 44a-45a (Potter), 50a-51a (Vogeler), 56a-57a (Jackson), 60a-61a (Spurgeon). The district judges remanded all eight cases to state court, expressly basing each remand order on a lack of subject-matter jurisdiction. *See, e.g., id.* at 27a (Kircher), 30a (Dudley), 40a (Parthasarathy), 46a (Potter), 51a (Vogeler), 57a (Jackson), 64a (Spurgeon).

On respondents' appeal of the *Kircher* remand order, the Seventh Circuit initially ordered respondents to show cause why their appeal should not be dismissed for lack of jurisdiction under § 1447(d), which precludes appellate review of remand orders based on a district court's conclusion that it lacked subject-matter jurisdiction. The Seventh Circuit then, in acknowledged conflict with the Second and Ninth Circuits, issued a published decision holding that it had jurisdiction to review the district court's remand order. *See Kircher I*, Pet. App. 15a-16a (acknowledging conflicts with *Spielman*, *United Investors*, and *Abada*).

The Seventh Circuit noted that, under § 1447(d), a remand on a ground listed in § 1447(c) is unappealable. *See id.* at 12a. Section 1447(c) provides that a case must be remanded if the court lacks subject-matter jurisdiction. The court, however, did not accept the district court's explanation that its remand order was based on a lack of subject-matter jurisdiction. *See id.* at 27a. The court characterized the district court opinion as holding that removal was *proper* – notwithstanding the district court's statements that "removal is appropriate only if the Court has federal question jurisdiction over Plaintiffs' claims" (*id.* at 24a), and that "SLUSA does not permit removal of Plaintiffs' claims" because petitioners' claims were not preempted by SLUSA (*id.* at 26a-27a).

To reach its conclusion that the remand orders were appealable, the Seventh Circuit opined that SLUSA permits removal of all "covered class actions" – that is, all class actions that seek damages on behalf of more than 50 investors, *see* 15 U.S.C. § 77p(f)(2)(A) – even though the Act only preempts "covered class actions" that meet the further requirement of alleging an untrue statement or omission, or use of a manipulative or deceptive device, "in connection with the purchase or sale of a covered security," *id.* § 77p(b). The court did not address petitioners' argument that the words "as set forth in subsection (b)" in § 77p(c) make clear that only those actions preempted by SLUSA are subject to remand. Rather, it held that a district court may find removal proper even though a lawsuit is outside SLUSA's preemptive scope when the lawsuit is a "covered class action." The court found that remand of such a lawsuit is not based on a lack of subject-matter jurisdiction, because "a court lacks 'subject-matter jurisdiction' only when Congress has not authorized the federal judiciary to resolve the sort of issue presented by the case." *Kircher I*, Pet. App. 13a.

The Seventh Circuit concluded that a remand under SLUSA is unlike a "[n]ormal" remand that "leave[s] all substantive issues open to plenary resolution in the state court," because whether SLUSA preempts a class action is "one specific substantive decision . . . [that] must be made by the federal rather than the state judiciary." *Id.* at 15a. The Seventh Circuit reasoned that, under SLUSA, state judges are incapable of making a preemption ruling, and thus "it is now or never for appellate review of the question whether an action under state law is preempted." *Id.*

Having determined that it could exercise appellate jurisdiction over the district court's remand order in the *Kircher* case consistent with § 1447(d), the Seventh Circuit consolidated these eight cases, which present identical issues, for briefing and decision on the merits. The Seventh Circuit began by rejecting petitioners' renewed jurisdictional objections and stating that, under *Kircher I*,

the remand orders in all of the lawsuits were appealable. On the merits, the Seventh Circuit then held that SLUSA completely preempted petitioners' state-law claims.

In so holding, the Seventh Circuit recognized that "[e]very court of appeals to encounter SLUSA has held that its language has the same scope as its antecedent in Rule 10b-5." *Kircher II*, Pet. App. 5a. The court purported to agree with that conclusion, observing that SLUSA was designed to prevent Rule 10b-5 private plaintiffs from migrating to state court to avoid the PSLRA. The court acknowledged that its decision conflicted with prior decisions of the Second, Eighth, and Eleventh Circuits; that, in *Blue Chip Stamps*, the Supreme Court had held that investors who neither purchase nor sell securities have no cause of action under § 10(b) and Rule 10b-5; and that the *Spurgeon* complaint defined a class of non-trading shareholders who could not bring a private action under Rule 10b-5. *Id.* at 5a-7a.[9]

The Seventh Circuit nevertheless concluded that the *Spurgeon* plaintiffs' claims were "in connection with the purchase or sale" of securities and were preempted by SLUSA. The court read *Blue Chip Stamps*' holding that only purchasers or sellers can bring claims under § 10(b) and Rule 10b-5 *not* as an interpretation of the "in connection with the purchase or sale" language in the 1934 Act.

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[9] The Seventh Circuit ruled that the complaints in the other cases did not succeed in defining classes of non-trading shareholders because some of the investors who held shares during the class period undoubtedly purchased or sold shares during that period. Petitioners believe that this ruling is incorrect. Whether the classes include some individuals who happen also to be purchasers or sellers is irrelevant. The complaints assert negligence and recklessness claims on behalf of class members who were injured by market timing, which, as explained above, *see supra* p. 9, is a claim that only holders can assert. Purchasers or sellers could not bring the claims asserted in the complaints, because they are not injured by market timing. In any event, because the Seventh Circuit did find that the *Spurgeon* complaint defined a class of holders without claims under Rule 10b-5, the court's error on this point is not material to the petition.

Rather, the court viewed the *Blue Chip Stamps* rule as a policy-based, judicial limitation on the private right of action to enforce § 10(b) and Rule 10b-5 that is not grounded in the text of § 10(b). *See id.* at 7a (stating that "*Blue Chip Stamps* came out as it did" because "the Court wanted to confine [private] actions to situations where litigation is apt to do more good than harm"). The court concluded that, "[b]y depicting their classes as containing entirely non-traders, plaintiffs do not take their claims outside § 10(b) and Rule 10b-5; instead, they demonstrate only that the claims must be left to public enforcement." *Id.* at 8a.

REASONS FOR GRANTING THE PETITION

I. THE COURT SHOULD GRANT CERTIORARI TO REVIEW THE SEVENTH CIRCUIT'S HOLDING THAT REMAND ORDERS UNDER SLUSA ARE SUBJECT TO APPELLATE REVIEW

A. The Seventh Circuit's Exercise Of Appellate Jurisdiction Squarely Conflicts With Decisions Of Three Other Circuits

In holding that 28 U.S.C. § 1447(d) does not bar courts of appeals from reviewing a remand order based on a district court's finding that a plaintiff's claims are not preempted by SLUSA, the Seventh Circuit acknowledged it was creating a conflict with the Second and Ninth Circuits. Those circuits hold that SLUSA's preemption and removal provisions are co-extensive, meaning that a state-law action that falls outside of SLUSA's preemptive scope is not properly removed under SLUSA. In the Second Circuit, Ninth Circuit, and Eleventh Circuit (which agreed with the former two courts after the decision below), a district court's remand of such a lawsuit is based on a lack of subject-matter jurisdiction and is not reviewable under § 1447(d).

The Seventh Circuit, by contrast, insisted that SLUSA authorizes removal of lawsuits that the statute does not preempt; disregarded the district courts' own characteri-

zations of their remand orders as predicated on a lack of jurisdiction; and held that the remands of non-preempted lawsuits were not based on lack of jurisdiction. The division between the circuits is clear and stems from two opposing interpretations of SLUSA's removal provision: one (the Seventh Circuit's) that regards the provision as authorizing removal of all "covered class actions," and another (the Second, Ninth, and Eleventh Circuits') that regards it as authorizing removal only of those actions described in SLUSA's preemption provision.

1. Second Circuit – *Spielman*

In *Spielman*, the Second Circuit addressed whether it could review a district court order granting a motion to remand after determining that the defendant's alleged misrepresentations were not "in connection with the purchase or sale" of securities, and that the plaintiff's claims were therefore not preempted by SLUSA. The Second Circuit stated that "SLUSA's removal provision makes removable any class action preempted by 15 U.S.C. § 78bb(f)(1)(A) [SLUSA's preemption provision]." 332 F.3d at 123. Thus, in the Second Circuit's view, "SLUSA only converts into federal claims those state claims that fall within its clear preemptive scope, thereby confining federal question jurisdiction under this statutory regime to a subset of securities fraud cases." *Id.* at 124.

The Second Circuit explained that, after a defendant removes an action under SLUSA, the district court must determine whether the action meets "the substantive requirements necessary to sustain removal under SLUSA's preemption provision" (*id.*): "If a district court determines the action is *not* a 'preempted class action' and, therefore, removal was improper, the district court lacks subject matter jurisdiction to further entertain the action." *Id.* at 125. The Second Circuit concluded that, even though the district court in *Spielman* had not expressly stated that it was remanding for lack of jurisdiction, because the court had found the plaintiff's claims not to be preempted by SLUSA, its remand order was necessarily based on a lack

of jurisdiction and was not reviewable under § 1447(d). The Second Circuit's decision squarely conflicts with *Kircher I*, which held that a remand order that followed a finding of no preemption was not based on a lack of jurisdiction and *was* reviewable under § 1447(d). As Judge Newman succinctly explained in his *Spielman* concurrence, the issues "of complete preemption and the existence of subject matter jurisdiction . . . are the opposite sides of the same coin." *Id.* at 132.

2. Ninth Circuit – *Abada*

In *Abada*, the Ninth Circuit stated that SLUSA's removal provision "provides for the removal of 'any covered class action' 'based upon the statutory or common law of any State' 'alleging a misrepresentation or omission of a material fact in connection with the purchase or sale of a covered security.'" 300 F.3d at 1119 (quoting 15 U.S.C. § 78bb(f)(1) and (2)). The district court in *Abada*, like the district courts in this case, had found that the plaintiffs' claims were not preempted by SLUSA because they were not "in connection with the purchase or sale" of securities.

In accord with the Second Circuit, and in square conflict with the Seventh Circuit, the Ninth Circuit found that the district court's remand order was grounded on the absence of subject-matter jurisdiction and was not reviewable. The court held that, "[i]n order to decide whether it had subject matter jurisdiction, the district court was required to decide whether Abada's claims were completely preempted by SLUSA. Because construction of SLUSA was necessary for the resolution of subject matter jurisdiction, [Ninth Circuit precedent] does not apply to create appellate jurisdiction." *Id.* *See also United Investors*, *supra* (reaffirming the rule of *Abada*).

3. Eleventh Circuit – *Williams*

In *Williams*, decided after *Kircher I*, the Eleventh Circuit addressed whether it could review a district court order remanding a lawsuit that had been removed under SLUSA, but that asserted claims only under federal law.

The Eleventh Circuit found that the lawsuit was a "covered class action" involving a "covered security" as those terms are defined by SLUSA. 389 F.3d at 1186. However, the Eleventh Circuit also found that the lawsuit was not covered by SLUSA's preemption provision, because one of the requirements for preemption is that the action be "based upon the statutory or common law of any State or subdivision thereof." 15 U.S.C. § 77p(b). *See* 389 F.3d at 1188. The Eleventh Circuit observed that SLUSA's removal provision refers to SLUSA's preemption provision. *Id.* at 1189 n.6. The court concluded that, even though the district court never explicitly mentioned subject-matter jurisdiction, its remand order was based on a lack of removal jurisdiction and was not reviewable under § 1447(d). *See id.* at 1190 ("We therefore hold that the district court's remand order based on lack of removal jurisdiction, entered in response to a timely motion to remand, is not reviewable under § 1447(d).").[10] The *Williams* decision thus squarely conflicts with *Kircher I*, which held that, where the district court found that plaintiff's lawsuit was a "covered class action" but was not preempted, its remand order could not be based on a lack of subject-matter jurisdiction, notwithstanding the court's express statements that it was remanding for lack of jurisdiction.

A clear and acknowledged conflict thus exists between the Seventh Circuit and the Second, Ninth, and Eleventh Circuits. The Seventh Circuit has no intention of revisiting its position in light of the views of other circuits, because it recently reaffirmed *Kircher*'s holding that "a district court's remand of a case to state court based on

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[10] In *Riley*, the Eleventh Circuit had stated that, "in order to remove an action to federal court under SLUSA, the removing party must show that (1) the suit is a 'covered class action,' (2) the plaintiffs' claims are based on state law, (3) one or more 'covered securities' has been purchased or sold, and (4) the defendant misrepresented or omitted a material fact '*in connection with the purchase or sale of such security*.'" 292 F.3d at 1342.

SLUSA is appealable." *Disher v. Citigroup Global Markets Inc.*, 419 F.3d 649, 652 (7th Cir. 2005). Moreover, even a circuit that has not yet addressed the issue has similarly recognized the circuit conflict. *See Rowinski v. Salomon Smith Barney Inc.*, 398 F.3d 294, 298 n.2 (3d Cir. 2005) (noting "a division among the courts of appeals on an issue of appellate jurisdiction under SLUSA"). This Court's intervention is necessary to establish the proper interpretation of SLUSA's removal provision and the reviewability of remand orders under SLUSA.

B. The Seventh Circuit's Exercise Of Appellate Jurisdiction Is Inconsistent With This Court's Precedents And The Language Of SLUSA

Not only does the Seventh Circuit's decision conflict with the decisions of three other circuits, it is inconsistent with this Court's precedents. In *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124 (1995), the Court stated that § 1447(d) bars appellate review of remands based on grounds recognized in § 1447(c), such as lack of subject-matter jurisdiction. *See id.* at 127-28. That prohibition on appellate review extends not only to remand orders in suits removed under the general removal statute, but also to remand orders in cases removed under any other statute, even if the other statute contains an express remand provision of its own. *See id.* at 128. Moreover, it is immaterial whether the district court's decision that it lacked subject-matter jurisdiction was correct: § 1447(d) precludes review even of jurisdictional decisions that are clearly wrong. *See Gravitt v. Southwestern Bell Tel. Co.*, 430 U.S. 723, 723 (1977) (per curiam).

The district courts in these cases interpreted SLUSA's removal provision to confer removal jurisdiction only over cases preempted by SLUSA, and therefore remanded based on a perceived lack of subject-matter jurisdiction once they determined that petitioners' claims were not preempted. *See, e.g.*, Pet. App. 24a, 26a-27a (Kircher) (stating that "removal is appropriate only if the Court has federal question jurisdiction over Plaintiffs' claims" and

that "SLUSA does not permit removal of Plaintiffs' claims"), 28a, 30a (Dudley) (stating that "[t]hese cases do not belong in the federal district court" and that "they are not removable under SLUSA"), 39a-40a (Parthasarathy), 44a-45a (Potter), 50a-51a (Vogeler), 56a-57a (Jackson), 60a-61a (Spurgeon). Contrary to the Seventh Circuit's assertion, the district judges never held that "[r]emoval of this suit was proper." *Kircher I*, Pet. App. 14a. Even if the district courts were mistaken in their interpretation of SLUSA's removal provision – for example, because the Seventh Circuit is correct that SLUSA authorizes removal of all "covered class actions," not just preempted actions – the district courts' orders were still unreviewable under *Gravitt* and *Things Remembered*. *Kircher I*'s assertion that the district court had found removal to be proper is contrary to the district judges' explicit statements, and the Seventh Circuit's exercise of appellate jurisdiction conflicts with this Court's decisions.

Moreover, the Seventh Circuit's interpretation of SLUSA's removal provision is incorrect and unsupported by the statutory text. As the Second, Ninth, and Eleventh Circuits noted, SLUSA's removal provision cross-references SLUSA's preemption provision. SLUSA does not permit removal of all covered class actions, but of "[a]ny covered class action brought in any State court involving a covered security, *as set forth in subsection (b)*," 15 U.S.C. § 77p(c) (emphasis added), with subsection (b) being the preemption provision. The plain language of the removal provision indicates that Congress intended to authorize removal of those actions that met the requirements for preemption.

The Seventh Circuit's opinion utterly failed to address this language or the three conflicting circuits' interpretations of the removal provision. The Seventh Circuit simply chided the other circuits for being "mesmerized by the word 'jurisdiction.'" *Kircher I*, Pet. App. 16a, instead of recognizing that those courts quite naturally interpreted SLUSA to render removal proper only when an action is

within the scope of § 77p(b). In addition, the Seventh Circuit's insistence (*id.* at 15a) that *only* federal judges may resolve the issue of SLUSA preemption is an unprecedented reading of the statute, unsupported by text or legislative history, that conflicts with settled Supreme Court law regarding the ability of state courts to address a preemption defense. *See, e.g., Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 149-50 (1988) ("[W]hen a state proceeding presents a federal issue, even a pre-emption issue, the proper course is to seek resolution of that issue by the state court.").

Finally, the Seventh Circuit advanced a red herring in stating that district courts lack subject-matter jurisdiction "only when Congress has not authorized the federal judiciary to resolve the sort of issue presented by the case," *Kircher I*, Pet. App. 13a (citing *Kontrick v. Ryan*, 124 S. Ct. 906, 914-16 (2004), and *Scarborough v. Principi*, 124 S. Ct. 1856, 1864-65 (2004)). The Seventh Circuit noted that § 77p(d)(4) provides that, "[i]n an action that has been removed from a State court pursuant to subsection (c) of this section, if the Federal court determines that the action may be maintained in State court pursuant to this subsection, the Federal court shall remand such action to such State court." 15 U.S.C. § 77p(d)(4). According to the Seventh Circuit, that subsection, coupled with SLUSA's removal provision, authorizes federal courts to determine whether an action is preempted by SLUSA. The court below thus reasoned that a remand after a finding of no preemption is not based on a lack of jurisdiction, because Congress has authorized the federal judiciary to resolve the issue of preemption.

That reasoning misses the point by ignoring the statutory language fashioned by Congress. SLUSA specifically confers removal jurisdiction only on preempted actions. The fact that federal courts are "authorized" to resolve the issue of preemption in ruling on a motion to remand stems from the basic principle that federal courts have jurisdiction to determine their own jurisdiction. Under

SLUSA, after a defendant removes a case, a federal court must address the question of preemption to determine whether it has federal-question jurisdiction. A court's remand order based on a finding of no preemption is, for purposes of § 1447(d), no different from any other remand order based on a lack of federal-question jurisdiction following a defendant's removal of a case. The removals in all of the instant cases were initiated by respondents and were found improper by the district courts – not "proper," as *Kircher I* incorrectly asserted, Pet. App. 14a. Nothing in *Kontrick* or *Scarborough* suggests that the district courts' authority to resolve the preemption issue in ruling on motions to remand somehow meant that the courts' remand orders were not based on a lack of jurisdiction.

On the contrary, *Scarborough* explained that the "label" subject-matter jurisdiction refers to statutory prescriptions "'delineating the classes of cases . . . falling within a court's adjudicatory authority.'" *Scarborough*, 124 S. Ct. at 1865 (quoting *Kontrick*, 124 S. Ct. at 915). By ignoring the crucial clause in § 77p(c) – "as set forth in subsection (b)" – the Seventh Circuit missed that, under SLUSA, only that class of cases satisfying the requirements for preemption falls within a federal court's "adjudicatory authority" or removal jurisdiction. The Seventh Circuit thus incorrectly severed the jurisdictional issue from the substantive decision on preemption, when in fact the two "are the opposite sides of the same coin." *Spielman*, 332 F.3d at 132 (Newman, J., concurring).

C. The Reviewability Of Remand Orders Under SLUSA Is An Issue Of Great Importance Warranting This Court's Resolution

The circuit split over the reviewability of remand orders under SLUSA involves the core securities litigation circuits and is unlikely to be resolved without this Court's intervention. The Seventh Circuit concluded that such orders were reviewable in full awareness that two circuits had held to the contrary, and there is no reason to think that the court will alter its view. *See Disher*, 419 F.3d at

652 (declining to revisit the court's decision in *Kircher I*). There is also no reason to think that the Second, Ninth, or Eleventh Circuits will reach a different conclusion regarding SLUSA remand orders based on the reasoning of the Seventh Circuit. Indeed, the Eleventh Circuit determined that such orders were not reviewable after the Seventh Circuit had decided the opposite.

Kircher I pointed out that *Spielman* and *Abada* predated *Scarborough* and *Kontrick*. *See* Pet. App. 16a. However, as explained above, there is no reason to expect *Scarborough* or *Kontrick* to affect the analysis of the Second and Ninth Circuits. Moreover, as *Kircher I* recognized, *see id.*, the Ninth Circuit has reaffirmed the holding of *Abada* after *Kontrick*. *See United Investors*, *supra*.

The reviewability of remand orders under SLUSA is a question of great importance for the administration of the federal courts. That question is central not just in cases involving "holder" claims or market timing, but in the entire range of cases in which plaintiffs successfully contest the applicability of SLUSA's preemption provision. Whether remand orders in such cases are subject to immediate appellate scrutiny has a significant impact not only on the dockets of the federal courts of appeals, but also on the ability of plaintiffs to obtain a timely adjudication of their viable state-law claims. Letting the Seventh Circuit's erroneous decision stand will undermine the "strong congressional policy against review of remand orders," *Things Remembered*, 516 U.S. at 136 (Ginsburg & Stevens, JJ., concurring) (internal quotation marks omitted), unfairly delaying legitimate state-court suits. *See Spielman*, 332 F.3d at 124. In his dissent in *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1976), then-Justice Rehnquist offered a cogent explanation of the reasons for precluding appellate review of remand orders:

> Congress' purpose in barring review of all remand orders has always been very clear – to prevent the additional delay which a removing party may achieve by seeking appellate reconsideration of an

> order of remand. The removal jurisdiction extended by Congress works a significant interference in the conduct of litigation commenced in state court. While Congress felt that making available a federal forum in appropriate instances justifies some such interruption and delay, it obviously thought it was equally important that when removal to a federal court is not warranted the case should be returned to the state court as expeditiously as possible. If this balanced concern is disregarded, federal removal provisions may become a device affording litigants a means of substantially delaying justice.

Id. at 354-55 (Rehnquist, J., dissenting).

This Court's intervention is warranted to prevent defendants from "substantially delaying justice" in class actions that SLUSA does not preempt and to resolve the disagreement among the courts of appeals over the reviewability of SLUSA remand orders.[11] Moreover, this case is a particularly suitable vehicle. Practically, this

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[11] The Class Action Fairness Act of 2005 ("CAFA"), which applies to class action suits commenced on or after February 18, 2005, does not diminish the importance of the jurisdictional question presented. CAFA establishes federal jurisdiction over certain class actions despite the absence of complete diversity of citizenship; permits removal of such actions; and authorizes appellate review of remand orders in such actions. *See* CAFA § 5(a), 119 Stat. 12 (to be codified at 28 U.S.C. § 1453(c)(1)) ("notwithstanding section 1447(d), a court of appeals may accept an appeal from an order of a district court granting or denying a motion to remand a class action to the State court from which it was removed"). CAFA's provisions do *not* apply to "any class action that solely involves . . . a claim . . . concerning a covered security as defined under section 16(f)(3) of the Securities Act of 1933 (15 U.S.C. 78p(f)(3)) and section 28(f)(5)(E) of the Securities Exchange Act of 1934 (15 U.S.C. 78bb(f)(5)(E))." *Id.* § 4(a)(2), 119 Stat. 11 (to be codified at 28 U.S.C. § 1332(d)(9)(A)); *accord id.* § 5(a), 119 Stat. 13 (to be codified at 28 U.S.C. § 1453(d)). CAFA thus specifically exempts securities class actions: SLUSA continues to govern such actions, and questions about the proper interpretation of SLUSA's preemption and removal provisions are no less important after passage of CAFA. In CAFA, Congress chose not to disturb the balance struck in SLUSA between federal and state prerogatives in securities litigation.

Court will only have the opportunity to determine whether appellate jurisdiction exists over SLUSA remand orders in a case arising from a circuit that answers that question in the affirmative, and the only such circuit is the Seventh.

The Court very recently granted certiorari in *Dabit* to address whether SLUSA preempts claims brought by holders of securities. The Court, however, need not wait for a disposition of *Dabit* before determining whether to grant certiorari in this case. *Dabit* does not involve the jurisdictional question presented here. Moreover, the Court's decision on the merits in *Dabit* will not remedy the conflict in the courts of appeals over whether SLUSA remand orders are reviewable. Whether SLUSA preempts holder claims is wholly independent of the question whether a district court's determination that a claim is not preempted, erroneous or not, is subject to immediate appellate review. *Kircher* is an ideal companion case to *Dabit*. Granting certiorari in both cases will ensure the Court the opportunity to resolve the procedural as well as the substantive confusion regarding the operation of SLUSA's preemption, removal, and remand provisions, 15 U.S.C. § 77p(b), (c), and (d)(4).

II. THIS COURT HAS GRANTED CERTIORARI IN *MERRILL LYNCH V. DABIT* TO DECIDE WHETHER SLUSA PREEMPTS CLAIMS BROUGHT BY HOLDERS OF SECURITIES

When the Seventh Circuit split with three other circuits on whether SLUSA preempts holder claims, it deepened an already-existing confusion throughout the federal judiciary regarding SLUSA's preemptive scope. As one commentator has observed, "[t]he courts have struggled to interpret SLUSA's preemption provision, and the case law is in disarray." Jennifer O'Hare, *Preemption under the Securities Litigation Uniform Standards Act: If It Looks Like a Securities Fraud Claim and Acts Like a Securities Fraud Claim, Is It a Securities Fraud Claim?*, 56 Ala. L. Rev. 325, 326 (2004). This Court's intervention is

required both to clarify the meaning of SLUSA's preemption provision and to ensure that holders of securities who have suffered damages from issuers' unlawful conduct are not stripped of their legitimate state-law claims.

A. The Seventh Circuit's Decision That SLUSA Preempts Holder Claims Squarely Conflicts With The Decisions Of Three Other Circuits

Three circuits have held that state-law claims in connection with the retention of securities fall outside of SLUSA's preemptive scope. The Seventh Circuit acknowledged a clear conflict between its decision below and those of the Second, Eighth, and Eleventh Circuits.

1. Second Circuit - *Dabit*

In *Dabit*, the Second Circuit held that the meaning of "in connection with" under SLUSA was "coterminous" with the meaning of the nearly identical language of § 10(b) and Rule 10b-5, 395 F.3d at 28, and that the purchaser-seller rule of *Blue Chip Stamps* applies as a limit on SLUSA's "in connection with" requirement such that SLUSA does not preempt holding claims. The Second Circuit began by observing that the phrase "in connection with the purchase or sale of a covered security" has been extensively interpreted by the Supreme Court and lower federal courts in the context of § 10(b) and Rule 10b-5 litigation. The Second Circuit explained (*id.* at 36) that application of § 10(b) jurisprudence to SLUSA's language comports with the Act's stated goal of closing the "federal flight" loophole in the PSLRA:

> If the "in connection with" phrase is read to reach the same conduct under SLUSA as it does under § 10(b) and Rule 10b-5, then SLUSA will preempt precisely those state class actions which could be brought as federal actions subject to the heightened requirements of the PSLRA. If it were otherwise, actions might be preempted for meeting all of SLUSA's requirements, including the "in connection with" term, but not be capable of being brought

> under federal law for failure to meet the parallel requirement of Rule 10b-5, a result that the legislative history does not suggest Congress intended to produce in enacting SLUSA.

Finally, the Second Circuit rejected the precise argument endorsed by the Seventh Circuit: that the *Blue Chip Stamps* purchaser-seller rule is simply a judicially fashioned standing rule, not a textually based and substantive limit on the "in connection with purchase or sale" language. The Second Circuit acknowledged that "[t]he limitation on standing to bring private suit for damages for fraud in connection with the purchase or sale of securities is unquestionably a distinct concept from the general statutory and regulatory prohibition on fraud in connection with the purchase or sale of securities." *Id.* at 39. The court, however, found that observation to have "little persuasive force in this context, because SLUSA deals with precisely the category of actions subject to the purchaser-seller rule" (*id.*):

> Once it is agreed that Congress deliberately borrowed SLUSA's "in connection with" language from § 10(b), the fact that the standing rule is analytically distinct from the underlying prohibition on fraud does not compel the conclusion that SLUSA preempts more than the purchaser/seller category of private damages claims over which the "in connection with" source language operates. Because *only* purchasers and sellers have a federal private damages remedy, it is far more natural to suppose that Congress meant to import the settled standing rule along with the "in connection with" phrase as a substantive standard. Nor are we moved by the observation that the standing rule is merely a judge-made gloss on the statute and the Rule, because private Rule 10b-5 damages actions are themselves a creature of judicial implication.

Id. at 39-40.

The Second Circuit concluded that SLUSA's "wholesale importation" of the language that gave rise to the "balancing judgment" of *Blue Chip Stamps* – namely, the judgment that "the judicially-adopted bar on federal non-purchaser and non-seller claims was counterbalanced by the existence of remedies under state law" – must "be presumed to represent a ratification of that judgment." *Id.* at 40. In sum, the Second Circuit anticipated, thoroughly analyzed, and squarely rejected the Seventh Circuit's reasoning regarding the applicability of SLUSA to holder claims.

2. Eighth Circuit – *Green*

Like the Second Circuit, the Eighth Circuit in *Green* turned to cases construing the identical language in § 10(b) and Rule 10b-5 to interpret the "in connection with the purchase or sale" language in SLUSA. The Eighth Circuit observed that, in *Blue Chip Stamps*, the Court refused to read that language broadly, limiting standing under § 10(b) and Rule 10b-5 to purchasers and sellers of securities. The Eighth Circuit concluded that "nonsellers and nonpurchasers of securities are not covered by SLUSA's preemption provision," because Congress enacted SLUSA in full awareness of the judicial gloss on § 10(b), "which acknowledged that causes of actions for the 'nonpurchase' or 'nonsale' of securities were not covered by the 1934 Act, and that state law would fill those gaps." 279 F.3d at 598 (internal quotation marks omitted). Like the Second Circuit's *Dabit* decision, the Eighth Circuit's decision squarely conflicts with *Kircher II*.

3. Eleventh Circuit – *Riley*

In *Riley*, the Eleventh Circuit concluded, based on the same analysis as the Second and Eighth Circuits, that SLUSA does not preempt claims dealing with the retention of securities, rather than with purchase or sale. *See* 292 F.3d at 1345. The Eleventh Circuit stated that the "in connection with the purchase or sale" language of SLUSA incorporates the meaning of the same phrase in § 10(b) and Rule 10b-5. The Eleventh Circuit further

noted that "[a]nalogizing to § 10b-5 is particularly appropriate because SLUSA was specifically enacted as an amendment to the 1933 and 1934 Acts." *Id.* at 1342.

There is a clear division between the Second, Eighth, and Eleventh Circuits on the one hand, and the Seventh Circuit on the other hand, regarding the applicability of SLUSA's preemption provision to holder claims. Only last month, the Seventh Circuit reaffirmed that, while three other circuits had held that "claims related solely to the *retention* of securities, as opposed to a purchase or sale, . . . are not prempted by SLUSA," it was bound by the decision in *Kircher II* to conclude that such holder claims were preempted by SLUSA. *Disher*, 419 F.3d at 655 (acknowledging conflict with the Second, Eighth, and Eleventh Circuits).

B. The Seventh Circuit's Interpretation Of SLUSA's Preemptive Scope Is Contrary To This Court's *Blue Chip Stamps* Decision And Congressional Intent

The Seventh Circuit's decision is contrary to Supreme Court precedent. In *Blue Chip Stamps*, the Court interpreted § 10(b) and Rule 10b-5 to permit private lawsuits only by purchasers or sellers of securities. The Court made clear that the purchaser-seller rule, far from being untethered to the "in connection with the purchase or sale" language of § 10(b), was an interpretation of that language in the context of private securities litigation. For example, the Court stated that "the wording of § 10(b), making fraud *in connection with the purchase or sale of a security* a violation of the Act, is surely badly strained when construed to provide a cause of action, not to purchasers and sellers of securities, but to the world at large." 421 U.S. at 733 n.5.

Referring to *Birnbaum v. Newport Steel Corp.*, 193 F.2d 461 (2d Cir. 1952) – the Second Circuit opinion that originated the purchaser-seller rule – the Court observed that longstanding acceptance of *"Birnbaum's* reasonable interpretation of the wording of § 10(b), wording which is

directed toward injury suffered 'in connection with the purchase or sale' of securities, argues significantly in favor of acceptance of the *Birnbaum* rule by this Court." 421 U.S. at 733 (footnote omitted). The Court added that "[t]he wording of § 10(b) directed at fraud 'in connection with the purchase or sale' of securities stands in contrast with the parallel antifraud provision of the 1933 Act. . . . When Congress wished to provide a remedy to those who neither purchase nor sell securities, it had little trouble in doing so expressly." *Id.* at 733-34.

The Court's reliance on policy concerns in *Blue Chip Stamps* "to flesh out the portions of the law with respect to which neither the congressional enactment nor the administrative regulations offer conclusive guidance," *id.* at 737, does not mean that the purchaser-seller rule is not an interpretation of the "in connection with" phrase, albeit one guided by policy as well as text. SLUSA deals with private securities litigation and should be construed consistently with this Court's interpretation of the "in connection with the purchase or sale" language in such litigation. The Seventh Circuit was wrong simply to disregard *Blue Chip Stamps* after recognizing that the "in connection with" language of SLUSA "has the same scope as its antecedent in Rule 10b-5." *Kircher II*, Pet. App. 5a.

The Seventh Circuit's ruling also runs afoul of this Court's presumption against preemption. "'[B]ecause the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-empt state-law causes of action.'" *Bates v. Dow Agro-Sciences LLC*, 125 S. Ct. 1788, 1807 (2005) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)). The presumption against preemption applies not only to the question whether Congress intended any preemption at all, but also to questions about the scope of an express preemption statute. *See Medtronic, supra.*

As this Court made clear in *Blue Chip Stamps*, claims based on the retention of securities have traditionally been "available to nonpurchasers and nonsellers under

state law." 421 U.S. at 739 n.9. Nothing in the text or background of SLUSA manifests a clear intent to preempt the state-law holding claims that *Blue Chip Stamps* acknowledged would be preserved. Indeed, the legislative history does not mention holding claims. *See Dabit*, 395 F.3d at 41-42 (discussing historical materials). SLUSA's language, the conference report, and the statements of SLUSA's proponents all indicate that SLUSA aimed to prevent circumvention of the PSLRA and therefore preempted only those claims that could be brought in federal court. The Seventh Circuit's decision to the contrary is inconsistent with *Blue Chip Stamps*, as well as with this Court's preemption jurisprudence.

C. Whether SLUSA Preempts Holder Claims Is An Issue Of Great Importance

As a result of the practice of market timing, tens of millions of investors have suffered a dilution of their securities holdings that is estimated at $5 to $10 billion per year.[12] Under the Seventh Circuit's ruling, even though these investors were injured by unlawful conduct on the part of mutual funds and fund managers, they have no viable claims under either federal or state law. "If Congress had intended to deprive injured parties of a long available form of compensation, it surely would have expressed that intent more clearly." *Bates*, 125 S. Ct. at 1801 (citing *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251 (1984)). Only holders of securities can seek redress for market-timing activity; as explained above, *see supra* p. 9, purchasers and sellers are not injured by market timing. The Seventh Circuit was wrong to suggest that

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[12] *See, e.g.*, Jennifer Barrett, "Inexcusable," MSNBC.com, Nov. 11, 2003 (interview with John Bogle, founder and former CEO of the Vanguard Group, estimating market-timing dilution to cost investors $5 to $10 billion per year), *available at* http://www.msnbc.com/id/3403565/site/newsweek. *See also* Eric Zitzewitz, *Who Cares About Shareholders? Arbitrage-Proofing Mutual Funds*, 19 J.L. Econ. & Org. 245, 260 (2003) ("total annualized dilution in the first three quarters of 2001 can be estimated at $4.9 billion per year").

petitioners could simply redefine the plaintiff classes to include purchasers and sellers, and could then bring their market-timing claims in federal court. *See Kircher II*, Pet. App. 9a. Contrary to the Seventh Circuit's statements, *see id.*, petitioners' claims do not depend on any statements made or omitted in connection with their purchases of the funds' securities. Petitioners do not allege that respondents misled them by failing to disclose the existence of market timing; rather, they allege negligence and recklessness on the part of respondents in failing to protect their investments from market timing. Permitting the Seventh Circuit's ruling to stand would deprive the victims of market timing of any avenue of recourse in the state or federal courts.

Approximately 200 market-timing suits have been filed against mutual funds in the last two years. *See Kircher II*, Pet. App. 9a. This Court's intervention is necessary to ensure that those lawsuits, involving numerous plaintiffs and billions of dollars in damages, are resolved correctly and consistently. Just two days ago, the Court recognized the importance of the questions presented in this case by granting certiorari in *Dabit* to address whether, "as the Seventh Circuit held earlier this month and in direct conflict with the decision below, SLUSA preempts state law class action claims based upon allegedly fraudulent statements or omissions brought solely on behalf of persons who were induced thereby to hold or retain (and not purchase or sell) securities." *Dabit* Pet. at i, No. 04-1371. If the Court does not grant this petition to address the jurisdictional question presented – which is not at issue in *Dabit* – it should at the very least hold the petition pending resolution of *Dabit*, and then grant certiorari on Question 1.

CONCLUSION

The petition for a writ of certiorari should be granted. In the alternative, the Court should hold the petition pending resolution of *Dabit*.

Respectfully submitted,

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September 29, 2005

APPENDIX

TABLE OF CONTENTS

Page

Opinion of the United States Court of Appeals for the Seventh Circuit, *Kircher, et al. v. Putnam Funds Trust, et al.*, Nos. 04-1495, *et al.* (Apr. 5, 2005) 1a

Opinion of the United States Court of Appeals for the Seventh Circuit, *Kircher, et al. v. Putnam Funds Trust, et al.*, No. 04-1495 (June 29, 2004) 10a

Order of the United States Court of Appeals for the Seventh Circuit, *Dudley, et al. v. Putnam International Equity Fund, et al.*, Nos. 04-1496 & 04-1608 (June 30, 2004) 18a

Order of the United States Court of Appeals for the Seventh Circuit, *Parthasarathy, et al. v. Artisan Funds, Inc., et al.*, No. 04-1628 (June 30, 2004) 19a

Order of the United States Court of Appeals for the Seventh Circuit, *Luettinger, et al. v. Scudder International Fund, Inc., et al.*, Nos. 04-1650 & 04-1651 (June 30, 2004) 20a

Order of the United States Court of Appeals for the Seventh Circuit, *Vogeler v. Columbia Wanger Asset Management, et al.*, Nos. 04-1660 & 04-1661 (June 30, 2004) 21a

Order of the United States Court of Appeals for the Seventh Circuit, *Jackson v. Van Kampen Series Fund, Inc., et al.*, No. 04-2162 (June 30, 2004) 22a

Memorandum and Order of the United States District Court for the Southern District of Illinois, *Kircher, et al. v. Putnam Funds Trust, et al.*, No. 03-CV-0691-DRH (Jan. 27, 2004) 23a

Memorandum and Order of the United States District Court for the Southern District of Illinois, *Dudley, et al. v. Putnam International Equity Fund, et al.*, Civil Nos. 03-852-GPM & 03-853-GPM (Jan. 27, 2004) 28a

Memorandum and Order of the United States District Court for the Southern District of Illinois, *Parthasarthy, et al. v. T. Rowe Price International Funds, Inc., et al.*, No. 03-CV-00673-DRH (Jan. 30, 2004) 31a

Memorandum and Order of the United States District Court for the Southern District of Illinois, *Potter, et al. v. Janus Investment Fund, et al.*, No. 03-CV-0692-DRH (Feb. 9, 2004) 41a

Memorandum and Order of the United States District Court for the Southern District of Illinois, *Vogeler v. Columbia Acorn Trust, et al.*, No. 03-CV-0843-DRH (Feb. 12, 2004) 47a

Memorandum and Order of the United States District Court for the Southern District of Illinois, *Jackson v. Van Kampen Series Fund, Inc., et al.*, No. 04-CV-00056-DRH (Apr. 1, 2004) 52a

Memorandum and Order of the United States District Court for the Southern District of Illinois, *Spurgeon v. Pacific Life Ins. Co., et al.*, Case No. 04-CV-0355-MJR (June 24, 2004) 58a

Order of the United States Court of Appeals for the Seventh Circuit Denying Rehearing, *Kircher, et al. v. Putnam Funds Trust, et al.*, Nos. 04-1495, *et al.* (May 2, 2005) 65a

Complaint, *Kircher, et al. v. Putnam Funds Trust, et al.*, Cause No. 03-L-1255 (3d Jud. Cir. Ct., Madison Cty., Ill. filed Sept. 16, 2003) (excerpt) 66a

Complaint, *Potter, et al. v. Janus Investment Fund, et al.*, Cause No. 03-L-1254 (3d Jud. Cir. Ct., Madison Cty., Ill. filed Sept. 16, 2003) (excerpt) 71a

Complaint, *Parthasarthy, et al. v. T. Rowe Price International Funds, Inc., et al.*, Cause No. 03-L-1253 (3d Jud. Cir. Ct., Madison Cty., Ill. filed Oct. 3, 2003) (excerpt) 78a

Complaint, *Dudley, et al. v. Putnam International Equity Fund, et al.*, Cause No. 03-L-1539 (3d Jud. Cir. Ct., Madison Cty., Ill. filed Nov. 10, 2003) (excerpt) 83a

Complaint, *Vogeler v. Columbia Acorn Trust, et al.*, Cause No. 03-L-1550 (3d Jud. Cir. Ct., Madison Cty., Ill. filed Nov. 13, 2003) (excerpt) 88a

Complaint, *Jackson v. Van Kampen Series Fund, Inc., et al.*, Cause No. 03-L-2036 (3d Jud. Cir. Ct., Madison Cty., Ill. filed Nov. 13, 2003) (excerpt) 93a

Complaint, *Spurgeon v. Pacific Life Ins. Co.*, Cause No. 04-L-241 (3d Jud. Cir. Ct., Madison Cty., Ill. filed Mar. 12, 2004) 98a

Statutory and Regulatory Provisions Involved:

15 U.S.C. § 77p 118a
15 U.S.C. § 78j 123a
15 U.S.C. § 78bb 125a
28 U.S.C. § 1291 ..... 134a
28 U.S.C. § 1331 ..... 135a
28 U.S.C. § 1332 ..... 136a
28 U.S.C. § 1441 ..... 138a
28 U.S.C. § 1447 ..... 141a
17 C.F.R. § 240.10b-5 ..... 142a

Letter from Supreme Court Clerk regarding extension request for filing a petition for a writ of certiorari (July 22, 2005) 143a

Letter from Supreme Court Clerk regarding further extension request for filing a petition for a writ of certiorari (Aug. 26, 2005) 144a

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 04-1495, 04-1496, 04-1608, 04-1628, 04-1650, 04-1651, 04-1660, 04-1661, 04-2162, 04-2687

CARL KIRCHER AND ROBERT BROCKWAY, INDIVIDUALLY AND ON BEHALF OF A CLASS, ET AL.,
Plaintiffs-Appellees,

v.

PUTNAM FUNDS TRUST AND PUTNAM INVESTMENT MANAGEMENT, LLC, ET AL.,
Defendants-Appellants.

Appeals from the United States District Court
for the Southern District of Illinois

[Argued Jan. 7, 2005]

[Decided Apr. 5, 2005]

Before: EASTERBROOK, RIPPLE, and WOOD, Circuit Judges.

EASTERBROOK, Circuit Judge.

Complaints filed in the circuit court of Madison County, Illinois, charge several mutual funds with setting prices in a way that arbitrageurs can exploit. The funds removed the suits to federal court and asked the district judges to dismiss them under the Securities Litigation Uniform Standards Act of 1998 (SLUSA). Instead the federal judges remanded each suit. Last year we held that these remands are appealable. See *Kircher v. Putnam Funds Trust*, 373 F.3d 847 (7th Cir.2004). Now we must decide whether SLUSA blocks litigation in state court. (Plaintiffs

have asked us to overrule our decision about appellate jurisdiction, but their arguments are unpersuasive.)

Mutual funds must set prices at which they sell and redeem their own shares once a day, and must do so at the net asset value of the funds' holdings. (All of the defendants, which operate in interstate and international commerce, are regulated under the Investment Company Act of 1940; we call them "mutual funds" for convenience.) Each defendant sets that price at 4 p.m. Eastern time, shortly after the New York Stock Exchange closes. Orders placed before the close of business that day are executed at this price.

When the funds hold assets that trade in competitive markets, they must value the assets at their market price. 15 U.S.C. § 80a-2(a)(41)(B)(ii), 17 C.F.R. § 270.2a-4(a). Defendants implement this requirement by valuing securities at the closing price of the principal exchange or market in which the securities are traded. For domestic securities this yields a current price; for securities of foreign issuers, however, it may produce a price that is as much as 15 hours old. (European markets close 5 or 6 hours ahead of New York; Asian markets close 12 to 15 hours before New York.)

Many securities trade on multiple markets or over the counter. Stock of a Japanese firm that closes in Tokyo at ¥10,000 might trade in Frankfurt at € 75.22 (equivalent to ¥10,500) between the close in Tokyo and the close in New York – but the mutual fund nonetheless would value each share at ¥10,000, because that was its most recent price in the issuer's home market. If foreign stocks move predominantly up during this interval (or if one foreign security moves substantially higher), the mutual fund as a whole would carry a 4 p.m. price below what would be justified by the latest available information, and an arbitrageur could purchase shares before 4 p.m. with a plan to sell the next day at a profit. Likewise arbitrageurs could gain if the foreign stock falls after the close in its home market, and the arbitrageur knows that the U.S. mutual fund will

be overpriced at 4 p.m. relative to the price it is likely to have the next trading day when new information from abroad finally is reflected in the fund's valuation. See Richard L. Levine, Yvonne Cristovici & Richard A. Jacobsen, *Mutual Fund Market Timing*, Federal Lawyer 28 (Jan. 2005).

A short-swing-trading strategy would not be attractive unless the foreign securities' prices had moved enough to cover the transactions costs of matched purchases and sales of the mutual fund shares, but for no-load funds that have substantial investments in foreign markets this condition sometimes is satisfied. Arbitrageurs then make profits with slight risk to themselves, diverting gains from the mutual funds' long-term investors while imposing higher administrative costs on the funds (whose operating expenses rise with each purchase and redemption). Plaintiffs contend that the mutual funds acted recklessly in failing to block arbitrageurs from reaping these profits. Available means might include levying fees on short-swing transactions, adopting to a front-end-load charge, reducing the number of trades any investor can execute (or deferring each trade by one day), and valuing the securities of foreign issuers at the most current price in *any* competitive market (organized or over the counter), and not just the closing price on the issuers' home stock exchanges. Some mutual funds have begun to take steps to curtail arbitrage, while disclosing residual vulnerabilities more prominently, but the litigation targets those funds that have not done so (or targets the period before a given fund acted).

SLUSA added to the Securities Act of 1933 and the Securities Exchange Act of 1934 parallel provisions curtailing certain class actions under state law. As in last year's jurisdictional opinion, we limit attention to § 16 of the 1933 Act, 15 U.S.C. § 77p, because the additions to the 1934 Act are functionally identical. See 15 U.S.C. § 78bb. As amended by SLUSA, § 77p(b) reads:

> No covered class action based upon the statutory or common law of any State or subdivision thereof may be maintained in any State or Federal court by any private party alleging –
>
> (1) an untrue statement or omission of a material fact in connection with the purchase or sale of a covered security; or
>
> (2) that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security.

Investments in mutual funds are "covered securities," see § 77p(f)(3), and all of these suits are "covered class actions," see § 77p(f)(2), because plaintiffs seek to represent more than 50 investors and each action is direct rather than derivative. (Derivative proceedings are not "covered class actions". See § 77p(f)(2)(B). See also *Burks v. Lasker*, 441 U.S. 471, 99 S.Ct. 1831, 60 L.Ed.2d 404 (1979), and *Kamen v. Kemper Financial Services, Inc.*, 500 U.S. 90, 111 S.Ct. 1711, 114 L.Ed.2d 152 (1991), which note that state-law derivative claims may proceed against federally regulated mutual funds.) Section 77p(d) contains a number of additional exceptions, but plaintiffs do not contend that any of them applies to these actions. Thus everything turns on subsection (b), which forecloses a suit based on state law in which a private class alleges "(1) an untrue statement or omission of a material fact in connection with the purchase or sale of a covered security; or (2) that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security."

That familiar language comes from Rule 10b-5, 17 C.F.R. § 240.10b-5, which is based on § 10(b) of the 1934 Act, 15 U.S.C. § 78j(b). Rule 10b-5 reads:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

> (a) To employ any device, scheme, or artifice to defraud,
>
> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

Every court of appeals to encounter SLUSA has held that its language has the same scope as its antecedent in Rule 10b-5. *Dabit v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 395 F.3d 25, 34-36 (2d Cir.2005); *Rowinski v. Salomon Smith Barney Inc.*, 398 F.3d 294, 299 (3d Cir.2005); *Green v. Ameritrade, Inc.*, 279 F.3d 590, 596-97 (8th Cir.2002); *Falkowski v. Imation Corp.*, 309 F.3d 1123, 1131 (9th Cir.2002), amended, 320 F.3d 905 (2003); *Riley v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 292 F.3d 1334, 1342-43 (11th Cir.2002). We agree with this conclusion. SLUSA is designed to prevent plaintiffs from migrating to state court in order to evade rules for federal securities litigation in the Private Securities Litigation Reform Act of 1995. See *Spielman v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 332 F.3d 116, 122-24 (2d Cir.2003) (discussing how PSLRA and SLUSA work). SLUSA can do its job only if subsection (b) covers those claims that engage Rule 10b-5 (and thus come within the 1995 statute) if presented directly under federal law; this is why SLUSA borrows the Rule's language. Unfortunately, however, the other circuits do not agree among themselves (or with the SEC) what Rule 10b-5 itself means. The phrase "in connection with the purchase or sale" of a security is the sticking point.

The Supreme Court held in *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 95 S.Ct. 1917, 44 L.Ed.2d 539 (1975), that investors who neither purchase nor sell

securities may not collect damages in private litigation under § 10(b) and Rule 10b-5, even if failure to purchase or sell was the result of fraud. Assuming that SLUSA's "in connection with" language means "able to pursue a private right of action after *Blue Chip Stamps*," plaintiffs attempted to frame complaints that avoid any allegations of purchase or sale. All but one of the classes is defined as investors who held shares of a given mutual fund between two specified dates. As an effort to evade SLUSA, this class definition is a flop: some of the investors who held shares during the class period must have purchased their interest (or increased it) during that time; others, who owned shares at the beginning of the period, undoubtedly sold some or all of their investment during the window. Each of the funds has substantial daily turnover, so the class of "all holders" during even a single day contains many purchasers and sellers. All of these class actions therefore must be dismissed. (Plaintiffs do not contend that any *other* part of SLUSA is pertinent; in particular, they did not argue in their briefs – and did not maintain at oral argument despite the court's invitation – that their suits allege mismanagement rather than deceit or manipulation. See *Santa Fe Industries, Inc. v. Green*, 430 U.S. 462, 97 S.Ct. 1292, 51 L.Ed.2d 480 (1977). Counsel for the plaintiffs declined to explain how state law would support a direct action that did not rely on deceit or manipulation. A claim based on mismanagement likely would need to be cast as a derivative action, which none of these suits purports to be. Nor does any of the suits assert that a mutual fund broke a promise, so that state contract law would supply a remedy.)

The complaint in *Spurgeon v. Pacific Life Insurance Co.* avoids this pitfall. It defines the class as all investors who held the fund's securities during a defined period *and* neither purchased nor sold shares during that period. *Blue Chip Stamps* would prevent such a private action from proceeding under Rule 10b-5. Plaintiffs insist that any private action that is untenable after *Blue Chip Stamps*

also is unaffected by SLUSA. The district judge, agreeing with this perspective, remanded *Spurgeon* to state court.

An equation between SLUSA's coverage and the scope of private damages a[illegible]s under Rule 10b-5 has the support of the second ci[illegible] (*Dabit*), the eighth circuit (*Green*), and the eleventh circuit (*Riley*). The ninth circuit (*Falkowski*), by contrast, has written that coverage of SLUSA tracks the coverage of § 10(b) and Rule 10b-5 when enforced by *public* plaintiffs (the SEC or a criminal prosecutor). The third circuit (*Rowinski*) has reserved decision on this issue. The Securities and Exchange Commission filed a brief in *Dabit* as amicus curiae supporting the view that SLUSA tracks the full scope of § 10(b) and Rule 10b-5, not just their enforcement in private actions. The way the *Spurgeon* class has been defined prevents us from following the third circuit's path: we must answer the question rather than postpone its resolution.

To say that SLUSA uses the same language as § 10(b) and Rule 10b-5 is pretty much to resolve the point. Section 10(b) defines a federal crime, and it also permits the SEC to enforce the prohibition through administrative proceedings. Invocation of this anti-fraud rule does not depend on proof that the agency or United States purchased or sold securities; instead the "in connection with" language ensures that the fraud occurs in securities transactions rather than some other activity. See *SEC v. Zandford*, 535 U.S. 813, 821-22, 122 S.Ct. 1899, 153 L.Ed.2d 1 (2002); *Superintendent of Insurance v. Bankers Life & Casualty Co.*, 404 U.S. 6, 12, 92 S.Ct. 165, 30 L.Ed.2d 128 (1971).

Blue Chip Stamps came out as it did not because § 10(b) and Rule 10b-5 are limited to situations in which the plaintiff itself traded securities, but because a private right of action to enforce these provisions is a judicial creation and the Court wanted to confine these actions to situations where litigation is apt to do more good than harm. The Justices observed that anyone can say that a failure to trade bore some relation to what the issuer did

(or didn't) disclose, but that judges and juries would have an exceedingly hard time knowing whether a given counterfactual claim ("I *would have* traded, if only . . .") was honest. The Court thought it best to limit private actions to harms arising out of actual trading, which narrows the affected class and simplifies proof, while leaving other securities offenses to public prosecutors.

Decisions since *Blue Chip Stamps* reiterate that it deals with private actions alone and does not restrict coverage of the statute and regulation. See *United States v. O'Hagan*, 521 U.S. 642, 664, 117 S.Ct. 2199, 138 L.Ed.2d 724 (1997); *Holmes v. SIPC*, 503 U.S. 258, 284, 112 S.Ct. 1311, 117 L.Ed.2d 532 (1992); *United States v. Naftalin*, 441 U.S. 768, 774 n. 6, 99 S.Ct. 2077, 60 L.Ed.2d 624 (1979). By depicting their classes as containing entirely non-traders, plaintiffs do not take their claims outside § 10(b) and Rule 10b-5; instead they demonstrate only that the claims must be left to public enforcement. It would be more than a little strange if the Supreme Court's decision to block private litigation by non-traders became the opening by which that very litigation could be pursued under state law, despite the judgment of Congress (reflected in SLUSA) that securities class actions must proceed under federal securities law or not at all. *Blue Chip Stamps* combined with SLUSA may mean that claims of the sort plaintiffs want to pursue must be litigated as derivative actions or committed to public prosecutors, but this is not a good reason to undercut the statutory language.

Could the SEC maintain an action under § 10(b) and Rule 10b-5 against mutual funds that fraudulently or manipulatively increased investors' exposure to arbitrage? Suppose the funds stated in their prospectuses that they took actions to prevent arbitrageurs from exploiting the fact that each fund's net asset value is calculated only once a day. That statement, if false (and known to be so), could support enforcement action, for the deceit would have occurred in connection with investors' purchases of the funds' securities. Similarly, if these funds had stated

bluntly in their prospectuses (or otherwise disclosed to investors) that daily valuation left no-load funds exposed to short-swing trading strategies, that revelation would have squelched litigation of this kind.

These observations show that plaintiffs' claims depend on statements made or omitted in connection with *their own* purchases of the funds' securities. They could have brought them directly under Rule 10b-5 in federal court (to the extent that the purchases occurred within the period of limitations). Indeed, most of the approximately 200 suits filed against mutual funds in the last two years alleging that the home-exchange-valuation rule can be exploited by arbitrageurs have been filed in federal court under Rule 10b-5. Our plaintiffs' effort to define non-purchaser-non-seller classes is designed to evade PSLRA in order to litigate a securities class action in state court in the hope that a local judge or jury may produce an idiosyncratic award. It is the very sort of maneuver that SLUSA is designed to prevent.

We hold that SLUSA is as broad as § 10(b) itself and that limitations on private rights of action to enforce § 10(b) and Rule 10b-5 do not open the door to litigation about securities transactions under state law. Plaintiffs' claims are connected to their own purchases of securities and thus are blocked by SLUSA, whose preemptive effect is not confined to knocking out state-law claims by investors who have *winning* federal claims, as plaintiffs suppose. It covers both good and bad securities claims – *especially* bad ones. The judgments of the district courts are reversed, and the cases are remanded with instructions to undo the remand orders and dismiss plaintiffs' state-law claims.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 04-1495

CARL KIRCHER AND ROBERT BROCKWAY,
INDIVIDUALLY AND ON BEHALF OF A CLASS,
Plaintiffs-Appellees,

v.

PUTNAM FUNDS TRUST AND
PUTNAM INVESTMENT MANAGEMENT, LLC,
Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Illinois

[Submitted May 26, 2004]

[Decided June 29, 2004]

Before: EASTERBROOK, EVANS, and WILLIAMS, Circuit Judges.

EASTERBROOK, Circuit Judge.

Plaintiffs own shares in Putnam Funds Trust, a mutual fund regulated by the Securities and Exchange Commission under statutes such as the Securities Act of 1933, the Securities Exchange Act of 1934, and the Investment Company Act of 1940. Contending that the fund and its investment adviser (Putnam Investment Management) had engaged in misconduct that reduced the value of their shares, plaintiffs filed suit in state court, invoking state law alone. They propose to represent a class of the Fund's investors. By forswearing reliance on federal law plaintiffs hope to avoid the strictures of federal statutes such as the Private Securities Litigation Reform Act of 1995.

Similar maneuvers by other investors in the wake of the 1995 statute led Congress to enact the Securities Litigation Uniform Standards Act of 1998. This statute, usually known by its ungainly acronym SLUSA, blocks many class actions based on state law when the issuers are covered by the federal securities laws. Preemption normally is an affirmative defense, to be evaluated by the court in which the plaintiff elects to sue. See, e.g., *Franchise Tax Board of California v. Construction Laborers Vacation Trust*, 463 U.S. 1, 103 S.Ct. 2841, 77 L.Ed.2d 420 (1983). SLUSA departs from the norm by permitting defendants to remove so that a federal court may evaluate the defense in advance of any step in the state litigation. See 15 U.S.C. §§ 77p(c), 78bb(f)(2). If the federal court determines that the claim is preempted, it dismisses the suit; otherwise it remands for proceedings under state law. 15 U.S.C. §§ 77p(b), (d)(4), 78bb(f)(1), (3)(D).

Defendants removed this suit under § 77p(c). (From here on, we mention only § 77p; provisions in § 78bb are functionally identical.) They asked the district judge to find the action foreclosed by § 77p(b), which provides:

> No covered class action based upon the statutory or common law of any State or subdivision thereof may be maintained in any State or Federal court by any private party alleging –
>
> (1) an untrue statement or omission of a material fact in connection with the purchase or sale of a covered security; or
>
> (2) that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security.

The district court concluded that the proceeding is a "covered class action" because plaintiffs seek damages on behalf of more than 50 investors. (Section 77p(f)(2)(A) provides the full definition of "covered class action.") But the judge concluded that the suit is not affected by § 77p(b) because plaintiffs do not allege loss "in connection with the purchase or sale" of securities; they have held throughout

the class period and claim to be injured by events that diminished the value realized by all investors. The court's conclusion that § 77p(b) does not thwart plaintiffs' claims required a remand under the terms of § 77p(d)(4):

> In an action that has been removed from a State court pursuant to subsection (c), if the Federal court determines that the action may be maintained in State court pursuant to this subsection, the Federal court shall remand such action to such State court.

In the opinion's final paragraph, the district judge added: "Because the Court lacks subject matter jurisdiction, the Court REMANDS this action to the Madison County, Illinois Circuit Court." (Capitalization and boldface in original.) This sentence had led to the dispute that requires our resolution.

Because it ends the litigation in federal court, a remand is a "final decision" that may be appealed under 28 U.S.C. § 1291. See *Quackenbush v. Allstate Insurance Co.*, 517 U.S. 706, 711-15, 116 S.Ct. 1712, 135 L.Ed.2d 1 (1996). Defendants filed a timely notice of appeal from the district court's remand. But we must reckon with 28 U.S.C. § 1447(d), which says that "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise." In *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 96 S.Ct. 584, 46 L.Ed.2d 542 (1976), the Court held that § 1447(d) is not as sweeping as its language suggests; instead, the Justices concluded, it blocks review only when the district court acts under the authority granted by § 1447(c) or an equivalent statute. See *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 116 S.Ct. 494, 133 L.Ed.2d 461 (1995), which recapitulates the Court's views on § 1447(d).

Lack of subject-matter jurisdiction is a ground on which remand is authorized (indeed, required) by § 1447(c), and accordingly a district judge's conclusion that jurisdiction is lacking is not subject to appellate review. See, e.g., *Gravitt v. Southwestern Bell Telephone Co.*, 430 U.S. 723, 97 S.Ct. 1439, 52 L.Ed.2d 1 (1977); *Rubel v. Pfizer Inc.*,

361 F.3d 1016 (7th Cir.2004); *Adkins v. Illinois Central R.R.*, 326 F.3d 828 (7th Cir.2003); *Phoenix Container, L.P. v. Sokoloff*, 235 F.3d 352 (7th Cir.2000). Section 77p(d)(4), by contrast, is not within § 1447(c) or equivalent to it, for a remand under § 77p(d)(4) comes at the end rather than the outset of federal adjudication. The Supreme Court has itself reviewed remand decisions that fall outside the scope of § 1447(c). *Quackenbush* and *Thermtron* are two; *Carnegie-Mellon University v. Cohill*, 484 U.S. 343, 108 S.Ct. 614, 98 L.Ed.2d 720 (1988), is another. We must decide how this situation fits.

One possibility is that the district judge's use of the word "jurisdiction" is conclusive. We held in *Rubel* and *Phoenix Container* that a court may not look behind a jurisdictional remand to examine the reasons why the district judge thought jurisdiction lacking; plaintiffs say that the same principle applies here. Yet defendants do not want us to pierce an ultimate conclusion in order to get at the intermediate steps in the syllogism. Their point, rather, is that "jurisdiction" is a word of many shadings, and that judges sometimes use the word "jurisdiction" or the phrase "subject-matter jurisdiction" when they mean something else. Twice in the past few months the Supreme Court has observed that a court lacks "subject-matter jurisdiction" only when Congress has not authorized the federal judiciary to resolve the sort of issue presented by the case (or the Constitution forbids adjudication). See *Kontrick v. Ryan*, 540 U.S. 443, ---- - ----, 124 S.Ct. 906, 914-16, 157 L.Ed.2d 867 (2004); *Scarborough v. Principi*, 541 U.S. 401, ---- - ----, 124 S.Ct. 1856, 1864-65, 158 L.Ed.2d 674, ---- - ---- (2004). There may be many other reasons why a court should not resolve a dispute, but these differ from the lack of subject-matter jurisdiction.

In *Gravitt*, *Rubel*, *Adkins*, and *Phoenix Container* the district judges held that removal was improper; the litigation never should have come to federal court. That is not, however, what the district judge found here. Because plaintiffs represent more than 50 investors, this is a

"covered class action" and a federal judge is not only authorized but also required to decide whether any court may entertain the litigation. A conclusion that a suit is not a "covered class action" (say, because just 40 investors stand to recover damages) would imply that removal had been improper, and such a decision would come within § 1447(d).

Removal of this suit was proper, the district judge held; that is why the court proceeded to the question how § 77p(b) affects the litigation. Only after making the substantive decision that Congress authorized it to make did the district court remand. After making the decision required by § 77p(b), the district court had nothing else to do: dismissal and remand are the only options. Perhaps one could say that jurisdiction evaporated at that juncture, but that would be tautological. Once a court does all that the statute authorizes, there is no adjudicatory competence to do more. That is not the "lack of subject-matter jurisdiction" that authorizes a remand. Otherwise every federal suit, having been decided on the merits, would be dismissed "for lack of jurisdiction" because the court's job was finished. Cf. *Bell v. Hood*, 327 U.S. 678, 66 S.Ct. 773, 90 L.Ed. 939 (1946).

We must distinguish between a decision that "this court lacks adjudicatory competence" and a decision that "the court has been authorized to do X and having done so should bow out." The former implies lack of subject-matter jurisdiction, as *Kontrick* and *Scarborough* explain; the latter implies the presence of jurisdiction. A good example of the second category is a suit under federal law with a state-law claim supported by the supplemental jurisdiction. 28 U.S.C. § 1367. District courts should relinquish supplemental jurisdiction under certain circumstances, remanding to state court if the suit originated there. 28 U.S.C. §§ 1367(c), 1441(c). We know from *Carnegie-Mellon* that § 1447(d) does not foreclose review of such a remand. In both *Carnegie-Mellon* and *Quackenbush* the district judge found the removal proper but

concluded that the state court should handle some issues. In *Carnegie-Mellon* the remand reflected limits to the supplemental jurisdiction, and in *Quackenbush* the district judge concluded that abstention was appropriate so that the state judiciary could resolve points of state law. In both cases the Supreme Court reviewed the decision on the merits, treating a remand as unaffected by § 1447(d) when the propriety of the removal was not in doubt.

This suit was properly removed. The district judge made a substantive decision under authority granted by a federal statute. It follows that the remand is unaffected by § 1447(d). This makes practical sense too. The goal of that statute is that a contest about what forum should resolve the dispute be wrapped up quickly, so that the litigation can get under way. Appellate consideration of what amounts to a venue dispute slows things down to little good end, for the state court is competent to address the merits. SLUSA means, however, that one specific substantive decision in securities litigation must be made by the federal rather than the state judiciary. Appellate review of decisions under § 77p(b) will promote accurate and consistent implementation of that statute, at little cost in delay beyond what the authorized removal itself creates. Yet if the remand is deemed non-appealable, then a major substantive issue in the case will escape review – for SLUSA ensures that only the federal judiciary makes the § 77p(b) decision. Normal remands, for which § 1447(d) is designed, leave all substantive issues open to plenary resolution in the state court (and, if necessary, the Supreme Court of the United States). That's not how SLUSA works; it is now or never for appellate review of the question whether an action under state law is preempted. In the unusual securities class action where expedition is vital, we can accelerate the appeal's disposition. See *Abney v. United States*, 431 U.S. 651, 662 & n. 8, 97 S.Ct. 2034, 52 L.Ed.2d 651 (1977).

We recognize that two courts of appeals have held that disputes about the application of § 77p and § 78bb cannot

be resolved by federal appellate judges. See *Spielman v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 332 F.3d 116 (2d Cir.2003); *United Investors Life Insurance Co. v. Waddell & Reed, Inc.*, 360 F.3d 960 (9th Cir.2004); *Abada v. Charles Schwab & Co.*, 300 F.3d 1112 (9th Cir.2002). All of these decisions precede *Scarborough*, and although *United Investors* came a month after *Kontrick* the court did not discuss it. Both the second and the ninth circuits were mesmerized by the word "jurisdiction" and did not see the difference between a case that never should have been removed and a case properly removed and remanded only when the federal job is done.

Suits that the district court itself finds to have been properly removed are unaffected by § 1447(d). That's the upshot of *Carnegie-Mellon* and *Quackenbush*. "[W]e understand *Carnegie-Mellon* to permit review when the district court believes that removal was proper and that later developments authorize remand." *In re Amoco Petroleum Additives Co.*, 964 F.2d 706, 708-09 (7th Cir.1992). *Adkins* qualifies this statement with the observation that if the "later development" is one that demonstrates the impropriety of removal in the first place, then § 1447(d) applies. 326 F.3d at 832-34. Here, however, later developments did not undercut the propriety of the removal; the only pertinent development is that the district court completed its appointed task. Thus the principle of *Amoco Petroleum Additives* covers our situation. *Adkins* observes that this principle enjoys the support of the fourth, fifth, and eleventh circuits too.

Technically this opinion creates a conflict among the circuits about appellate review of decisions under SLUSA, so we have circulated it before release to all active judges under Circuit Rule 40(e). But our disposition reflects nothing more than application of settled circuit law to a different substantive statute. We could not follow the second and ninth circuits without overruling *Amoco Petroleum Additives* and later decisions in this circuit. Because *Amoco Petroleum Additives* has the support of at least three other

circuits – not to mention *Things Remembered* and *Quackenbush* – overruling would be inappropriate. On the Rule 40(e) poll, none of the active judges favored a hearing en banc.

The appeal is within our appellate jurisdiction and will proceed to briefing and decision on the merits.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 04-1496 & 04-1608

STEVE DUDLEY AND BETH DUDLEY,
INDIVIDUALLY AND ON BEHALF OF ALL OTHERS
SIMILARLY SITUATED,
Plaintiffs-Appellees,

v.

PUTNAM INTERNATIONAL EQUITY FUND,
PUTNAM INVESTMENT MANAGEMENT, LLC,
AND PUTNAM INVESTMENT FUNDS,
Defendants-Appellants.

Appeals from the United States District Court
for the Southern District of Illinois
No. 03 C 852
G. Patrick Murphy, Chief Judge

[Decided June 30, 2004]

ORDER

Before: EASTERBROOK, EVANS, and WILLIAMS, Circuit Judges.

This consolidated appeal is within our appellate jurisdiction and will proceed to briefing and merits. *See Kircher v. Putnam Funds Trust*, No. 04-1495, slip op. (7th Cir. June 29, 2004).

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 04-1628

T.K. PARTHASARATHY, EDMUND WOODBURY, AND STUART A. SMITH, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Plaintiffs-Appellees,

v.

ARTISAN FUNDS, INC., A CORPORATION, AND ARTISAN PARTNERS LIMITED PARTNERSHIP,
Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Illinois
No. 03 C 673
David R. Herndon, Judge

[Decided June 30, 2004]

ORDER

Before: EASTERBROOK, EVANS, and WILLIAMS, Circuit Judges.

This consolidated appeal is within our appellate jurisdiction and will proceed to briefing and merits. *See Kircher v. Putnam Funds Trust*, No. 04-1495, slip op. (7th Cir. June 29, 2004).

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 04-1650 & 04-1651

DOROTHY LUETTINGER AND ROBERT POTTER,
INDIVIDUALLY AND ON BEHALF OF ALL OTHERS
SIMILARLY SITUATED,
Plaintiffs-Appellees,

v.

SCUDDER INTERNATIONAL FUND, INC., A CORPORATION, AND
DEUTSCHE INVESTMENT MANAGEMENT AMERICAS, INC.,
JANUS INVESTMENT FUND, A BUSINESS TRUST, AND
JANUS CAPITAL MANAGEMENT LLC,
Defendants-Appellants.

Appeals from the United States District Court
for the Southern District of Illinois
No. 03 C 692
David R. Herndon, Judge

[Decided June 30, 2004]

ORDER

Before: EASTERBROOK, EVANS, and WILLIAMS, Circuit Judges.

This consolidated appeal is within our appellate jurisdiction and will proceed to briefing and merits. *See Kircher v. Putnam Funds Trust*, No. 04-1495, slip op. (7th Cir. June 29, 2004).

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 04-1660 & 04-1661

GARY VOGELER, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Plaintiff-Appellee,

v.

COLUMBIA WANGER ASSET MANAGEMENT L.P. AND COLUMBIA ACORN TRUST,
Defendants-Appellants.

Appeals from the United States District Court
for the Southern District of Illinois
No. 03 C 843
David R. Herndon, Judge

[Decided June 30, 2004]

ORDER

Before: EASTERBROOK, EVANS, and WILLIAMS, Circuit Judges.

This consolidated appeal is within our appellate jurisdiction and will proceed to briefing and merits. *See Kircher v. Putnam Funds Trust*, No. 04-1495, slip op. (7th Cir. June 29, 2004).

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 04-2162

AVERY JACKSON,
Plaintiff-Appellee,

v.

VAN KAMPEN SERIES FUND, INC. AND
VAN KAMPEN INVESTMENT ADVISORY CORPORATION,
Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Illinois
No. 04 C 56
David R. Herndon, Judge

[Decided June 30, 2004]

ORDER

Before: EASTERBROOK, EVANS, and WILLIAMS, Circuit Judges.

This consolidated appeal is within our appellate jurisdiction and will proceed to briefing and merits. *See Kircher v. Putnam Funds Trust*, No. 04-1495, slip op. (7th Cir. June 29, 2004).

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

No. 03-CV-0691-DRH

CARL KIRCHER AND ROBERT BROCKWAY,
INDIVIDUALLY AND ON BEHALF OF ALL OTHERS
SIMILARLY SITUATED,
Plaintiffs,

v.

PUTNAM FUNDS TRUST, A BUSINESS TRUST,
PUTNAM INVESTMENT MANAGEMENT, LLC,
EVERGREEN INTERNATIONAL TRUST, A BUSINESS TRUST, AND
EVERGREEN INVESTMENT MANAGEMENT COMPANY, LLC,
Defendants.

[Filed Jan. 27, 2004]

MEMORANDUM AND ORDER

HERNDON, District Judge:

I. Introduction and Background

This matter comes before the Court on Plaintiff's motion to remand and corrected motion to remand (Docs. 19 & 26). Because this Court lacks subject matter jurisdiction over Plaintiff's claims, the Court remands this matter to the Madison County, Illinois Circuit Court.

On September 16, 2003, Carl Kircher and Robert Brockway filed this purported class action in the Madison County, Illinois Circuit Court against Putnam Funds Trust, Putnam Investment Management, LLC, Evergreen International Trust, a business trust, and Evergreen

Investment Management Company, LLC (Doc. 2).[1] Plaintiffs are long-term mutual fund investors who claim that the value of their shares were diluted by Defendants' certain practices. Plaintiffs' complaint contains four-counts alleging alternate theories based on state law claims of breach of fiduciary duty.

On October 23, 2003, Defendants removed the case to this Court based on federal question jurisdiction, **28 U.S.C. § 1331**. Specifically, Defendants maintain that Plaintiffs' claims are preempted by the Securities Litigation Uniform Standards Act of 1998, **15 U.S.C. § 77 *et seq.*** ("SLUSA") and that the complaint presents a substantial federal question. Thereafter, Plaintiffs flied a motion to remand.

II. Analysis

Defendants may remove this case to this court only if the federal district courts would have original jurisdiction over the action. **See 28 U.S.C. § 1441; *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987)**. "[T]he burden of establishing federal jurisdiction falls on the party seeking removal." ***Doe v. Allied Signal, Inc.*, 985 F.2d 908, 911 (7th Cir. 1993)**. Defendants do not contend that diversity jurisdiction exists. Thus, removal is appropriate only if the Court has federal question jurisdiction over Plaintiffs' claims.

The general rule is that a plaintiff is the master of his own complaint and can avoid federal question jurisdiction by pleading exclusively state law claims. **See *Caterpillar*, 482 U.S. at 392; *Franchise Tax Bd. v. Construction Laborers Vacation Trust for S. Cal.*, 463 U.S. 1,**

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[1] Plaintiffs seek to represent the following class: "All persons in the United States who held shares in the Putnam International Growth & Income Fund or Evergreen International Growth Fund for a period of more than fourteen days before redeeming or exchanging them during the period beginning from five years prior to and through the date of the filing of this complaint." (Doc. 2, ¶ 41). To date, no motion to certify the class has been filed. Thus, as of this date, this suit is not proceeding as a class action.

10 103 (1983); *Bastien v. AT&T Wireless Services, Inc.*, 205 F.3d 983, 986 (7th Cir. 2000). If the plaintiff's claim arises under state law, the mere assertion of federal preemption as a defensive argument – sometimes called "conflict preemption" – will not confer federal question jurisdiction. ***Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. at 63-64 (1987); *Franchise Tax Bd. of Cal.*, 463 U.S. at 9-12**. "Complete preemption," on the other hand, is the doctrine which recognizes that federal law may sometimes so completely preempt a particular area that any civil complaint raising this select group of claims is necessarily federal in character. ***Metropolitan Life*, 481 U.S. at 63-64**.

First, Defendants maintain that the allegations in Plaintiffs' complaint satisfy SLUSA's "in connection with" requirement. The Court rejects this argument.

SLUSA provides for the removal to federal court of certain class actions based on state law. **15 U.S.C. § 78bb(f). *Accord Professional Mgt Associates, Inc. Employees' Profit Sharing Plan v. KPMG, LLP*, 335 F.3d 800, 802 (8th Cir. 2003)**. SLUSA was enacted to prevent plaintiffs from seeking to evade the protections that federal law provides against abusive litigation by filing suit in state court. ***Newby v. Enron Corp.*, 338 F.3d 467, 471 (5th Cir. 2003)**. The primary way SLUSA accomplishes this objective is by preempting certain securities fraud class actions brought under state law. ***Id.*** The Eighth Circuit Court of Appeals stated:

> With some exceptions, SLUSA made the federal courts the exclusive fora for most class actions involving the purchase and sale of securities. Primarily, SLUSA mandates that any class action based on an allegation that a "covered security" was sold [or purchased] through misrepresentation, manipulation, or deception shall be removable to federal court.

***Green v. Ameritrade, Inc.*, 279 F.3d 590, 595-596 (8th Cir. 2002)**.

However, not all securities claims are preempted by SLUSA. A party claiming SLUSA preemption must demonstrate that the claim satisfies the following:

> (1) the action is a "covered class action" under SLUSA, (2) the action purports to be based on state law, (3) the defendant is alleged to have misrepresented or omitted a material fact (or to have used or employed any manipulative or deceptive device or contrivance), and the defendant is alleged to have engaged in conduct described by criterion (3) "in connection with" the purchase or sale of a "covered security."

***Id.* at 595 (*citing* 15 U.S.C. §§ 78bb(f)(1)-(2).**

Based on the following, the Court finds that Defendants have not met the fourth requirement for SLUSA preemption. Plaintiffs' claims are not claims "in connection with the purchase or sale of a covered security." There is no claim asserted by a purchaser or seller; the claims are brought by those who held shares. If a claim is not cognizable under Section 10(b)(5) of the Securities and Exchange Act of 1934 because not "in connection the [*sic*] purchase or sale of a covered security," it similarly is not a claim "in connection with the purchase or sale of a covered security" for SLUSA purposes.

Just the other day, the Honorable Michael J. Reagan addressed this exact issue in ***Bradfisch v. Templeton Funds, Inc., et al.*, 03-CV-0760-MJR (January 23, 2004)** and found that SLUSA does *not* preempt state law claims of breach of fiduciary duty.[2] Judge Reagan held:

> "Bradfisch claims dilution of his ownership interests and voting rights. Bradfisch's complaint alleges dilution claims that only a holder of securities can bring. Such claims are not actionable under the Securities and Exchange Act of 1934. State law, not

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[2] The Bradfisch allegations and the allegations of this case are almost identical.

the 1934 Act, provides the remedy sought by Bradfisch and the class of holders he seeks to represent. Bradfisch's claims cannot be removed under SLUSA."

***Bradfisch*, 2003-CV-0760 (Doc. 18, p. 6).** This Court agrees with Judge Reagan's reasoning and finds that SLUSA does not permit removal of Plaintiffs' claims.

Next, Defendants maintain that removal was proper because a substantial federal question is presented on the face of Plaintiffs' complaint, namely the Investment Company Act of 1940, **15 U.S.C. §§ 80a-1, *et seq.* ("ICA").** The Court rejects this argument. Again, the Court agrees with Judge Reagan's ruling in ***Bradfisch*** on this issue. ***Bradfisch*, 2003-CV-0760 (Doc. 18, p. 7).** As in ***Bradfisch***, the Plaintiffs have not asserted claims under the ICA and Defendants have not identified any provision of the ICA which would render their state law claims removable to this Court.

III. Conclusion

Accordingly, the Court **GRANTS** Plaintiffs' motion to remand and corrected motion to remand (Docs. 19 & 26). Because the Court lacks subject matter jurisdiction, the Court **REMANDS** this action to the Madison County, Illinois Circuit Court. Further, the Court **DENIES as moot** Defendants' motion to stay (Doc. 15).

IT IS SO ORDERED.

Signed this 27th day of January, 2004.

/s/ DAVID R. HERNDON
DAVID R. HERNDON
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

Civil Nos. 03-852-GPM & 03-853-GPM

STEVE DUDLEY AND BETH DUDLEY,
INDIVIDUALLY AND ON BEHALF OF ALL OTHERS
SIMILARLY SITUATED,
Plaintiffs,

v.

PUTNAM INTERNATIONAL EQUITY FUND,
PUTNAM INVESTMENT MANAGEMENT, LLC, AND
PUTNAM INVESTMENT FUNDS,
Defendants.

[Filed Jan. 27, 2004]

MEMORANDUM AND ORDER

MURPHY, Chief District Judge:

These cases were set for a hearing on Monday, January 26, 2004, but the district court was closed and the hearing was cancelled due to inclement weather. The Court being keenly aware of Plaintiffs' request for prompt consideration of the Court's subject matter jurisdiction in light of a pending transfer to the Judicial Panel on Multidistrict Litigation, the Court will rule without a hearing. These cases do not belong in the federal district court, and there is no reason they should be swept into a massive MDL proceeding.

BACKGROUND

Plaintiffs, Steve and Beth Dudley, filed these actions in the Circuit Court for the Third Judicial Circuit, Madison County, Illinois, on November 10, 2003 (*see* Doc. 2).

Broadly speaking, the Dudleys are long-term mutual fund investors who claim that the value of their shares were diluted by certain Putnam practices. Putnam removed both actions to this Court on December 15, 2003, arguing that both cases are removable pursuant to the Securities Litigation Uniform Standards Act of 1998 ("SLUSA") and that the complaints present a substantial federal question. A timely filed motion to remand followed.

ANALYSIS

"[T]ho burden of establishing federal jurisdiction falls on the party seeking removal." *Doe v. Allied-Signal, Inc.*, 985 F.2d 908, 911 (7th Cir. 1993). Courts must interpret removal statutes narrowly and "presume that the plaintiff may choose his or her forum." *Id.* "Any doubt regarding jurisdiction should be resolved in favor of the states." *Id.* (citations om tted). Under the complete preemption doctrine, a state law claim becomes a federal question only when Congress intends that a federal statute completely preempts the field of law. *See Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392-93 (1987).

Congress passed the SLUSA in order to "'prevent plaintiffs from seeking to evade the protections that federal law provides against abusive litigation by filing suit in State, rather than federal, courts.' With some exceptions, SLUSA made the federal courts the exclusive fora for most class actions involving the purchase and sale of securities." *In re Lutheran Bhd. Variable Ins. Prods. Co. Sales Practices Litig.*, 105 F. Supp. 2d 1037, 1039 (D. Minn. 2000) (citations omitted). To establish that Plaintiffs' claims fall within SLUSA's preemptive scope, Putnam must show: (1) the action is a "covered class action" under SLUSA, (2) the action purports to be based on state law, (3) the defendant is alleged to have misrepresented or omitted a material fact (or to have used or employed any manipulative or deceptive device or contrivance), and (4) the defendant is alleged to have engaged in conduct described by criterion (3) "in connection with" the purchase or sale of a "covered

security." 15 U.S.C. § 78bb(f)(1)-(2). *See also Green v. Ameritrade, Inc.*, 279 F.3d 590, 596 (8th Cir. 2002).

Here, the Court agrees with the Dudleys that Putnam is unable to establish the fourth requirement for SLUSA preemption. The claims in both complaints are not claims "in connection with the purchase or sale of a covered security." Only *holders* of fund shares have the dilution of ownership interests and voting rights claims asserted in the complaints. The class the Dudleys seek to represent consists only of "long term shareholders," defined as persons who have owned shares for more than fourteen days. (*See* Doc. 2 at ¶ 37.) There is no claim asserted by a purchaser or seller; the claims are brought by those who *held* shares. These claims are not actionable under Section 10(b)(5) of the 1934 Securities and Exchange Act, and they are not removable under SLUSA. *See also Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975).

Finally, the Court questions whether the doctrine of substantial federal question remains viable in light of the Supreme Court's decision in *Beneficial Nat'l Bank v. Anderson*, 123 S. Ct. 2058 (2003). Even if the theory remains viable, these cases do not present a substantial federal question.

CONCLUSION

This Court lacks subject matter jurisdiction over these actions. Accordingly, Plaintiffs' motions to remand (Doc. 5 in both cases) are **GRANTED**, and these actions are **REMANDED** to the Circuit Court for the Third Judicial Circuit, Madison County, Illinois, pursuant to 28 U.S.C. § 1447(c).

IT IS SO ORDERED.

DATED this 27th day of January, 2004.

s/ G. PATRICK MURPHY
G. PATRICK MURPHY
Chief United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

No. 03-CV-0673-DRH

T.K. PARTHASARTHY, EDMUND WOODBURY, STUART ALLEN SMITH, AND SHARON SMITH, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Plaintiffs,

v.

T. ROWE PRICE INTERNATIONAL FUNDS, INC., A CORPORATION, T. ROWE PRICE INTERNATIONAL, INC., ARTISAN FUNDS, INC., A CORPORATION, ARTISAN PARTNERS LIMITED PARTNERSHIP, AIM INTERNATIONAL FUNDS, INC., A CORPORATION, AND AIM ADVISORS, INC.,
Defendants.

[Filed Jan. 30, 2004]

MEMORANDUM AND ORDER

HERNDON, District Judge:

I. Introduction

On September 16, 2003, Plaintiffs flied this purported class action in the Madison County, Illinois Circuit Court on behalf of long-term investors of certain mutual funds. On October 3, 2003, Plaintiffs filed a First Amended Complaint in state court asserting claims against T. Rowe Price International Funds, Inc., T. Rowe Price International, Inc. (otherwise referred to herein as "T. Rowe Price Defendants"), Artisan Funds, Inc., Artisan Partners Limited Partnership (otherwise referred to herein as "Artisan

Defendants"), AIM International Funds, Inc., and AIM Advisors, Inc. (otherwise referred to herein as "AIM Defendants").[1]

In Count I, Plaintiff T.K. Parthasarathy ("Parthasarthy") alleges that the Artisan Defendants breached their duties of care owed to owners of the fund by, *inter alia*, failing to implement proper portfolio valuation and share pricing policies. In Count II, Parthasarathy alleges that these Defendants willfully and wantonly breached their duties to investors. In Counts III and IV, respectively, Plaintiff Edmund Woodbury ("Woodbury") makes the same allegations against the T. Rowe Price Defendants. And in Counts V and VI, respectively, Plaintiffs Stuart Allen Smith and Sharon Smith ("Smiths") make the same allegations against the AIM Defendants. Each count seeks compensatory and punitive damages, prejudgment interests, costs, and attorneys' fees "not to exceed $75,000 per plaintiff or class member."

Based on the First Amended Complaint, the T. Rowe Price Defendants and the AIM Defendants filed a Notice of Removal, asserting that subject matter jurisdiction lies under both **28 U.S.C. § 1332**, the diversity statute, and **28 U.S.C. § 1331**, the federal question statute (Doc. 1). On October 23, 2003, the Artisan Defendants filed a consent to that removal (Doc. 16). Thereafter, Plaintiffs filed the instant motion to remand (Doc. 34).[2] Because the Court

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[1] Plaintiffs seek to represent the following class: "[A]ll persons in the United States who have owned shares of T. Rowe Price International, Artisan International [Fund], and AIM European Growth [Fund] for more than fourteen days from the date of purchase to the date of sale (redemption) or exchange ("long-term shareholders"). The class period commences five years prior to the filing of this complaint through the date of filing." (Doc. 2, ¶ 46). To date, no motion to certify the class has been filed. Thus, as of this date, this suit is *not* proceeding as a class action.

[2] The Court notes that Plaintiffs attempted to file a Second Amended Complaint in conjunction with their Reply "[o]ut of an abundance of caution." (Doc. 59, p. 1). The Magistrate Judge denied this motion (Doc. 63). Should Plaintiffs still desire to file a Second

lacks subject matter jurisdiction over Plaintiffs' claims, the Court grants Plaintiffs' motion to remand this matter to the Madison County, Illinois Circuit Court.

II. Background

Each of the Plaintiffs are long-term investors in one of the three mutual funds named as Defendants in this case. Defendants' funds are involved in the purchase of foreign securities principally traded in securities markets outside of the United States. Shares of these open end mutual funds are sold to investors at a price based upon the net asset value ("NAV") per share. NAV depends upon the fluctuating value of the fund's underlying portfolio securities. Defendants set this price once every business day at the close of trading on the New York Stock Exchange at 4:00 p.m. Eastern Time.

Plaintiffs allege that since many of the home markets for the foreign securities in Defendants' asset portfolio trade before Defendants set the NAV, the closing prices used to calculate the NAV are stale and do not reflect the price relevant information available. For example, during the interval that elapses between when Defendants set their share NAV "and release it to the NASD for communication to the public," securities markets in countries such as the United Kingdom, France, Japan, Russia, Hong Kong, Malaysia, Germany, and Australia have already traded for an entire session.

In other words, Plaintiffs allege that by failing to make daily adjustments based upon positive correlations between the upward or downward movements in United States and foreign markets and by choosing to use stale prices in valuing their fund shares and setting the daily NAVs, Defendants have exposed long-term shareholders (such as Plaintiffs) to market timing traders who take advantage of Defendants' stale pricing and obtain excess

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Amended Complaint in light of this Court's ruling, they will have to take this up with the state court.

profits at the expense of shareholders who are non-trading long-term buy-and-hold investors.

III. Analysis

As stated above, Defendants asserts jurisdiction under both the federal diversity and federal question statutes. The Court will address each claim to jurisdiction in turn.

A. Diversity Jurisdiction

The federal diversity statute requires complete diversity between the parties plus an amount in controversy which exceeds $75,000, exclusive of interest and costs. ***See* 28 U.S.C. § 1332**. Complete diversity means that "none of the parties on either side of the litigation may be a citizen of the state of which a party on the other side is a citizen." ***Howell v. Tribune Entertainment Co.*, 106 F.3d 215, 217 (7th Cir. 1997) (citation omitted)**. Here, it appears from the pleadings that complete diversity exists. Therefore, the question is whether Plaintiff's action satisfies the amount in controversy requirement of **28 U.S.C. § 1332(a)**.

The removal statue [*sic*], **28 U.S.C. § 1441**, is construed narrowly, and doubts concerning removal are resolved in favor of remand. ***Doe v. Allied-Signal, Inc.*, 985 F.2d 908, 911 (7th Cir. 1993)**. To remove an action based on federal diversity jurisdiction, a defendant must establish the elements by competent proof showing a reasonable probability that such jurisdiction exists. ***Chase v. Shop 'N Save Warehouse Foods, Inc.*, 110 F.3d 424, 427 (7th Cir. 1997)**. "[S]eparate claims of multiple plaintiffs cannot be aggregated to satisfy the jurisdictional amount requirement." ***Schreiber v. Lugar*, 518 F.2d 1099, 1102 (7th Cir. 1975); *see also Del Vecchio v. Conseco, Inc.*, 230 F.3d 974, 978 (7th Cir. 2000) (applying this "general rule" to class action suits)**. Therefore, the defendant must show that at least one of the plaintiffs has a claim that exceeds the $75,000 threshold.

The status of the case as disclosed by plaintiff's complaint is controlling on the issue as to whether the case is

removable. ***St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283, 291 (1938)**. If the face of the complaint establishes that the suit cannot involve the necessary amount, the case should be remanded. ***Id.* at 291-92**. "Accepted wisdom" provides that the plaintiff's evaluation of the stakes must be respected when deciding whether a claim meets the amount in controversy requirement for federal diversity jurisdiction. ***Barbers, Hairstyling for Men & Women, Inc. v. Bishop*, 132 F.3d 1203, 1205 (7th Cir. 1997) (*citing St. Paul Mercury*, 303 U.S. at 289)**. In fact, a plaintiff can block removal of an action based upon diversity jurisdiction by simply waiving his right to more. ***See In re Brand Name Prescription Drugs Antitrust Litig.*, 123 F.3d 599, 607 (7th Cir. 1997), *cert. denied*, 522 U.S. 1153 (1998)**.

In this case, Plaintiffs' First Amended Complaint expressly disclaims damages in excess of $75,000 per class member. In an effort to meet the $75,000 threshold, Defendants maintain that this case is a derivative action on behalf of the funds in which Plaintiffs' held shares, and that as such, easily exceeds the $75,000 threshold.

As an initial matter, whether a suit is derivative by nature or may be brought by a shareholder in his own right is governed by the law of the state of incorporation. ***See Kennedy v. Venrock Assoc., et al.*, 348 F.3d 584, 589-90 (7th Cir. 2003) (The question whether a suit is derivative by nature or may be brought by a shareholder in his own right is governed by the law of the state of incorporation). *See also Frank v. Hadesman & Frank, Inc.*, 83 F.3d 158, 159 (7th Cir. 1996); *Bagdon v. Bridgestone/Firestone, Inc.*, 916 F.2d 379, 382 (7th Cir. 1990)**. Here, the T. Rowe Price and AIM funds are incorporated in Maryland and the Artisan fund is incorporated in Wisconsin. Thus, Maryland law governs with respect to Plaintiffs' claims against the T. Rowe Price and AIM Defendants and Wisconsin law governs with respect to Plaintiffs' claims against the Artisan Defendants.

Recently the Honorable Michael J. Reagan addressed this exact issue in ***Bradfisch v. Templeton Funds, Inc., et al.*, 03-CV-0760-MJR (January 23, 2004)** and found under Maryland law the plaintiff's claims were direct, not derivative.[3] In reaching this conclusion, Judge Reagan first discussed ***Strougo v. Bassini***, a case central to the parties' dispute:

> In ***Strougo v. Bassini*, 282 F.3d 162, 171 (2d Cir. 2002)**, a plaintiff/shareholder sued the directors and officers of his closed-end mutual fund, alleging that a rights offering was coercive in that it penalized shareholders who did not participate. The district court dismissed the shareholder's direct claims on the ground that the injuries alleged 'applied to the shareholders as a whole.' The United State [*sic*] Court of Appeals for the Second Circuit *reversed* the dismissal.
>
> Applying Maryland law, the Second Circuit concluded that the shareholders could sue the defendants *directly* on the claims resulting from the coercive nature of rights offering.
>
> > [I]n the case of both the participating and non-participating shareholders, it would appear that the alleged injuries were to the shareholders alone and not to the Fund. These harms therefore constitute 'direct' shareholder claims under Maryland law. **The corporation cannot bring the action seeking compensation for these injuries because they were suffered by its shareholder not itself.**
>
> **282 F.3d 175.**

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[3] The *Bradfisch* allegations and the allegations of this case are almost identical.

Judge Reagan concluded:

> The same logic applies in the instant case. [Plaintiffs'] reduced equity value in the fund did not result from a reduction in fund assets but from a reallocation of equity value to the market time traders who bought the fund's undervalued shares. The fund *itself* was not injured by the sale of the undervalued shares. Rather, the injury alleged in the complaint is injury to [Plaintiffs] (and those similarly situated to [them]). Those claims do not clear the $75,000 amount in controversy hurdle. Because the amount in controversy does not suffice, this Court cannot exercise subject matter jurisdiction under the diversity statute, **28 U.S.C. § 1332**.

(Doc. 18, pp. 4-5). This Court agrees with Judge Reagan that under Maryland law these claims are direct, not derivative, and therefore Plaintiffs' claims as to T. Rowe Price and AIM Defendants do not meet the amount in controversy requirement.

This result is also in accord with Wisconsin law. ***See Jorgenson v. Water Works, Inc.*, 630 N.W.2d 230, 233 (Wis. App. Ct. 2001) (holding under Wisconsin law whether a claim must be brought derivatively or may be brought by individually depends upon whether the injury alleged is primarily to the complaining shareholder or primarily to the corporation)**. While the Artisan Defendants attempt to equate these claims with those in ***Flynn v. Merrick*, 881 F.2d 446, 449 (7th Cir. 1989) (finding that shareholders could not pursue a direct claim against that the [*sic*] board of directors for mismanagement of corporate assets that decreased the value of the interest held by shareholders and debenture holders)** and ***Rose v. Schantz*, 201 N.W.2d 593, 597 (Wis. 1972) (dismissing an alternative direct cause of action based on the allegation that the directors impermissibly used corporation funds to pay off debts before due and to redeem stock)**, both these cases are distinguishable and

inapposite to this case. Accordingly, the Court finds that under Wisconsin law Plaintiffs' claims are direct, and therefore Plaintiffs' claims as to the Artisan Defendants do not meet the amount in controversy requirement. In sum, the Court finds that it lacks diversity jurisdiction.

B. Federal Question Jurisdiction

The general rule is that a plaintiff is the master of his own complaint and can avoid federal question jurisdiction by pleading exclusively state law claims. ***See Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392 (1987); *Franchise Tax Bd. v. Construction Laborers Vacation Trust for S. Cal.*, 463 U.S. 1, 10 (1983); *Bastien v. AT&T Wireless Services, Inc.*, 205 F.3d 983, 986 (7th Cir. 2000)**. If the plaintiff's claim arises under state law, the mere assertion of federal preemption as a defensive argument – sometimes called "conflict preemption" – will not confer federal question jurisdiction. ***Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 63-4 (1987); *Franchise Tax Bd. of Cal.*, 463 U.S. at 9-12**. "Complete preemption," on the other hand, is the doctrine which recognizes that federal law may sometimes so completely preempt a particular area that any civil complaint raising this select group of claims is necessarily federal in character. ***Metropolitan Life*, 481 U.S. at 63-4**.

First, Defendants maintain that the allegations in Plaintiffs' complaint satisfy SLUSA's "in connection with" requirement. The Court rejects this argument.

SLUSA provides for the removal to federal court of certain class actions based on state law. **15 U.S.C. § 78bb(f). *Accord Professional Mgt Associates, Inc. Employees' Profit Sharing Plan v. KPMG, LLP*, 333 F.3d 800, 802 (8th Cir. 2003)**. SLUSA was enacted to prevent plaintiffs from seeking to evade the protections that federal law provides against abusive litigation by filing suit in state court. ***Newby v. Enron Corp.*, 338 F.3d 467, 471 (5th Cir. 2003)**. The primary way SLUSA accomplishes this objective is by preempting certain securities fraud class actions

brought under state law. ***Id.*** The Eighth Circuit Court of Appeals stated:

> With some exceptions, SLUSA made the federal courts the exclusive fora for most class actions involving the purchase and sale of securities. Primarily, SLUSA mandates that any class action based on an allegation that a "covered security" was sold [or purchased] through misrepresentation, manipulation, or deception shall be removable to federal court.

***Green v. Ameritrade, Inc.*, 279 F.3d 590, 595-96 (8th Cir. 2002).**

However, not all securities claims are preempted by SLUSA. A party claiming SLUSA preemption must demonstrate that the claim satisfies the following:

> (1) the action is a 'covered class action' under SLUSA, (2) the action purports to be based on state law, (3) the defendant is alleged to have misrepresented or omitted a material fact (or to have used or employed any manipulative or deceptive device or contrivance), and the defendant is alleged to have engaged in conduct described by criterion, and (4) 'in connection with' the purchase or sale of a 'covered security.'

***Id.* at 595 (*citing* 15 U.S.C. §§ 78bb(f)(1)-(2)).**

Based on the following, the Court finds that Defendants have not met the fourth requirement for SLUSA preemption. Plaintiffs' claims are not claims "in connection with the purchase or sale of a covered security." There is no claim asserted by a purchaser or seller; the claims are brought by those who held shares. If a claim is not cognizable under Section 10(b)(5) of the Securities and Exchange Act of 1934 because it is not "in connection the [*sic*] purchase or sale of a covered security," it similarly is not a claim "in connection with the purchase or sale of a covered security" for SLUSA purposes.

Judge Reagan also addressed this issue in ***Bradfisch*, 03-CV-0760-MJR**, and found that SLUSA does *not* preempt state law claims of breach of fiduciary duty. Judge Reagan held:

> Bradfisch claims dilution of his ownership interests and voting rights. Bradfisch's complaint alleges dilution claims that only a holder of securities can bring. Such claims are not actionable under the Securities and Exchange Act of 1934. State law, not the 1934 Act, provides the remedy sought by Bradfisch and the class of holders he seeks to represent. Bradfisch's claims cannot be removed under SLUSA.

***Bradfisch*, 2003-CV-0760 (Doc. 18, p. 6)**. This Court agrees with Judge Reagan's reasoning and finds that SLUSA does not permit removal of Plaintiffs' claims.

Next, Defendants maintain that removal was proper because a substantial federal question is presented on the face of Plaintiffs' complaint, namely the Investment Company Act of 1940, **15 U.S.C. §§ 80a-1, *et seq.* ("ICA")**. The Court rejects this argument. Again, the Court agrees with Judge Reagan's ruling in ***Bradfisch*** on this issue. ***Bradfisch*, 2003-CV-0760 (Doc. 18, p. 7)**. As in ***Bradfisch***, the Plaintiffs have not asserted claims under the ICA and Defendants have not identified any provision of the ICA which would require their state law claims to be removable to this Court.

IV. Conclusion

Accordingly, the Court **GRANTS** Plaintiffs' motion to remand (Doc. 34). Because the Court lacks subject matter jurisdiction, the Court **REMANDS** this action to the Madison County, Illinois Circuit Court. The Court **DENIES as moot** the Artisan Defendants request for oral arguments (Doc. 70) as well as all other pending motions.

IT IS SO ORDERED.

Signed this 27th day of January, 2004.

/s/ DAVID R. HERNDON
DAVID R. HERNDON
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

No. 03-CV-0692-DRH

ROBERT POTTER AND DOROTHY LEUTTINGER, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Plaintiffs,

v.

JANUS INVESTMENT FUND, A BUSINESS TRUST; JANUS CAPITAL MANAGEMENT, LLC; SCUDDER INTERNATIONAL FUND, INC.; DEUTSCHE INVESTMENT MANAGEMENT AMERICAS, INC.,
Defendants.

[Filed Feb. 9, 2004]

MEMORANDUM AND ORDER

HERNDON, District Judge:

I. INTRODUCTION

Before the Court is the motion to remand for lack of subject matter jurisdiction submitted by Plaintiffs (Doc. 26). On September 16, 2003, Plaintiffs filed this suit in the Circuit Court of Madison County, Illinois (Doc. 2). On October 3, 2003, Defendants removed the suit to federal court asserting federal subject matter jurisdiction under **28 U.S.C. § 1332** and under **28 U.S.C. § 1331** based on the purported federal questions concerning the Securities Exchange Act of 1934 (SLUSA), **15 U.S.C. § 78bb** and the Investment Company Act of 1940 (ICA), **15 U.S.C. § 80a-44**. For the following reasons, the Court **GRANTS** Plaintiffs' motion to remand and **REMANDS** this case to the

Circuit Court of Madison County, Illinois, based on lack of subject matter jurisdiction (Doc. 26).

II. BACKGROUND

Plaintiffs are long-term investors in one of the two mutual funds named as defendants in this case. Both funds – Janus Investments Fund and Scudder International Fund (collectively, "the Funds") – are mutual funds which primarily purchase securities that are traded in securities markets outside the United States (Complaint ¶ 16). Such funds are intended for long-term investment, and the defendants have urged investors to invest in the Funds for the long term (*Id.* at ¶ 12). The defendants have marketed the advantages of such long-term ownership of funds (*Id.*). Janus Investment Fund is managed by the Delaware Corporation Janus Capital Management, LLC, and Scudder International Fund is managed by Maryland Corporation Deutsche Investment Management Americas, Inc. Plaintiffs have brought claims against Defendants alleging that Defendants' allowance of short-term buying and selling by some investors wrongfully led to the dilution of Plaintiffs' rights and equity in the Defendants' stocks.

II. Analysis

Defendants may remove this case to this court only if the federal district courts would have original jurisdiction over the action. **See 28 U.S.C. § 1441; *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987).** "[T]he burden of establishing federal jurisdiction falls on the party seeking removal." ***Doe v. Allied Signal, Inc.*, 985 F.2d 908, 911 (7th Cir. 1993).**

The general rule is that a plaintiff is the master of his own complaint and can avoid federal question jurisdiction by pleading exclusively state law claims. ***See Caterpillar*, 482 U.S. at 392; *Franchise Tax Bd. v. Construction Laborers Vacation Trust for S. Cal.*, 463 U.S. 1, 10 103 (1983); *Bastien v. AT&T Wireless Services, Inc.*, 205 F.3d 983, 986 (7th Cir. 2000).** If the plaintiff's claim arises under state law, the mere assertion of federal preemption as a defensive argument – sometimes called

"conflict preemption" – will not confer federal question jurisdiction. ***Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. at 63-64 (1987); *Franchise Tax Bd. of Cal.*, 463 U.S. at 9-12**. "Complete preemption," on the other hand, is the doctrine which recognizes that federal law may sometimes so completely preempt a particular area that any civil complaint raising this select group of claims is necessarily federal in character. ***Metropolitan Life*, 481 U.S. at 63-64**.

First, Defendants maintain that the allegations in Plaintiffs' complaint satisfy SLUSA's "in connection with" requirement.

The Court rejects this argument. SLUSA allows removal to federal court of certain class actions based on state law. **15 U.S.C. § 78bb(f)**. ***Accord Professional Mgt Associates, Inc. Employees' Profit Sharing Plan v. KPMG, LLP*, 335 F.3d 800, 802 (8th Cir. 2003)**. SLUSA was enacted to prevent plaintiffs from seeking to evade the protections that federal law provides against abusive litigation by filing suit in state court. ***Newby v. Enron Corp.*, 338 F.3d 467, 471 (5th Cir. 2003)**. The primary way SLUSA accomplishes this objective is by preempting certain securities fraud class actions brought under state law. ***Id.*** The Eighth Circuit Court of Appeals stated:

> With some exceptions, SLUSA made the federal courts the exclusive fora for most class actions involving the purchase and sale of securities. Primarily, SLUSA mandates that any class action based on an allegation that a "covered security" was sold [or purchased] through misrepresentation, manipulation, or deception shall be removable to federal court.

***Green v. Ameritrade, Inc.*, 279 F.3d 590, 595-596 (8th Cir. 2002)**.

However, not all securities claims are preempted by SLUSA. A party claiming SLUSA preemption must demonstrate that the claim satisfies the following:

> (1) the action is a "covered class action" under SLUSA, (2) the action purports to be based on state law, (3) the defendant is alleged to have misrepresented or omitted a material fact (or to have used or employed any manipulative or deceptive device or contrivance), and the defendant is alleged to have engaged in conduct described by criterion (3) "in connection with" the purchase or sale of a "covered security."

***Id.* at 595 (citing 15 U.S.C. §§ 78bb(f)(1)-(2).**

Based on the following, the Court finds that Defendants have not met the fourth requirement for SLUSA preemption. Plaintiffs' claims are not claims "in connection with the purchase or sale of a covered security." There is no claim asserted by a purchaser or seller; the claims are brought by those who held shares. If a claim is not cognizable under Section 10(b)(5) of the Securities and Exchange Act of 1934 because not "in connection the [*sic*] purchase or sale of a covered security," it similarly is not a claim "in connection with the purchase or sale of a covered security" for SLUSA purposes.

Recently, the Honorable Michael J. Reagan addressed this exact issue in ***Bradfisch v. Templeton Funds, Inc., et al.*, 03-CV-0760-MJR (January 23, 2004)** and found that SLUSA does *not* preempt state law claims of breach of fiduciary duty.[1] Judge Reagan held:

> "Bradfisch claims dilution of his ownership interests and voting rights. Bradfisch's complaint alleges dilution claims that only a holder of securities can bring. Such claims are not actionable under the Securities and Exchange Act of 1934. State law, not the 1934 Act, provides the remedy sought by Bradfisch and the class of holders he seeks to represent.

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[1] The Bradfisch allegations and the allegations of this case are almost identical.

> Bradfisch's claims cannot be removed under SLUSA."

***Bradfisch*, 2003-CV-0760 (Doc. 18, p. 6)**. This Court agrees with Judge Reagan's reasoning and finds that SLUSA does not permit removal of Plaintiffs' claims.

Second, Defendants maintain that removal was proper because a substantial federal question is presented on the face of Plaintiffs' complaint, namely the Investment Company Act of 1940, **15 U.S.C. §§ 80a-1, *et seq.* ("ICA")**.

The Court rejects this argument. Again, the Court agrees with Judge Reagan's ruling in ***Bradfisch*** on this issue. ***Bradfisch*, 2003-CV-0760 (Doc. 18, p. 7)**. As in ***Bradfisch***, the Plaintiffs have not asserted claims under the ICA and Defendants have not identified any provision of the ICA which would render their state law claims removable to this Court.

Third, Defendants argue that Plaintiffs' claims are removable based on diversity jurisdiction because their claims are worth more than $75,000. Defendants argue that Plaintiffs' claims are derivative and that consequently their claims are worth the amount the Funds lost – an amount much greater than $75,000.

Again, the Court agrees with Judge Reagan's ruling in ***Bradfisch*** on this issue. ***Bradfisch*, 2003-CV-0760 (Doc. 18, p. 4-5)**. The Court determines that no diversity jurisdiction exists since this is not a derivative action and Plaintiffs' claims individually are not worth more than $75,000. The state of incorporation governs whether a shareholder's action is derivative or based on his individual right. ***See, e.g., Kennedy v. Venrock Assoc.*, 384 F.3d 584, 589 (7th Cir. 2003)**. In this case, Maryland law applies as to Defendants Deutsche Investment Management Americas and Scudder International Fund, Inc., and Delaware law applies as to Defendants Janus Investment Fund and Janus Capital Management, LLC (Doc. 1). Under both Maryland and Delaware corporate law, a plaintiff sues individually as opposed to derivatively when his claim is based on a direct or separate injury to the share-

holder. ***See, e.g., Strougo v. Bassini*, 282 F.3d 162, 171 (2d Cir. 2002) (finding a non-derivative action under Maryland law when "[t]he corporation cannot bring the action seeking compensation for [the] injuries because there [*sic*] were suffered by its shareholders, not itself"): *Kramer v. Western Pac. Indus., Inc.*, 546 A.2d 348, 351 (Del. 1988) (stating "[t]o have standing to sue individually, rather than derivatively on behalf of the corporation, the plaintiff must allege more than an injury resulting from a wrong to the corporation").** In this case, Plaintiffs have based their claims strictly upon the direct and individual harm of stock equity dilution, a claim not actionable by the corporation itself. As such, the corporations losses are not attributable to each Plaintiffs' amount in controversy. In addition, Plaintiffs' complaint disclaims recovery of individual damages in excess of $75,000. Therefore, no diversity jurisdiction exists since Plaintiffs' claims do not amount to more than $75,000.

III. Conclusion

Accordingly, the Court **GRANTS** Plaintiffs' motion to remand (Doc. 26). Because the Court lacks subject matter jurisdiction, the Court **REMANDS** this action to the Madison County, Illinois Circuit Court. Further, the Court **DENIES as moot** all other pending motions (Docs. 15, 28, 54, 56).

IT IS SO ORDERED.

Signed this 9th day of February, 2004.

/s/ DAVID R. HERNDON
DAVID R. HERNDON
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

No. 03-CV-0843-DRH

GARY VOGELER, INDIVIDUALLY AND
ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Plaintiff,

v.

COLUMBIA ACORN TRUST AND
COLUMBIA WANGER ASSET MANAGEMENT, LP,
Defendants.

[Filed Feb. 12, 2004]

MEMORANDUM AND ORDER

HERNDON, District Judge:

I. INTRODUCTION

Because this case is exactly alike numerous other cases that have recently been remanded in the Southern District of Illinois, the Court **REMANDS** this case *sua sponte* based on lack of subject matter jurisdiction.[1] On November 13, 2003, Plaintiffs filed this suit in the Circuit Court of Madison County, Illinois (Doc. 2). On December 12, 2003, Defendants removed the suit to federal court asserting federal subject matter jurisdiction under **28 U.S.C.**

[1] *See, e.g., Bradfisch v. Templeton Funds, Inc.*, 03-CV-0760, Memorandum and Order, *6 (S.D. Ill. Jan. 23, 2004) (Reagan, J.); *Kircher v. Putnam Funds Trust, et al.*, 03-CV-0691-DRH, Memorandum and Order, *5 (S.D. Ill. Jan. 27, 2004) (Herndon, J.); *Dudley v. Putnam Investment Funds, et al.*, 03-CV-853-GPM, Memorandum and Order (S.D. Ill. Jan. 27, 2004) (Murphy, C.J.).

§ 1331 based on the purported federal questions concerning the Securities Exchange Act of 1934 (SLUSA), **15 U.S.C. § 78bb** and the Investment Company Act of 1940 (ICA), **15 U.S.C. § 80a-44**.

II. BACKGROUND

Plaintiff is a long-term investor in the Columbia Acorn International Fund ("the Fund"), a mutual fund which purchase [*sic*] securities that are traded in securities markets outside the United States (Complaint ¶ 16). Such funds are intended for long-term investment, and the defendants have urged investors to invest in the Funds for the long term (*Id.* at ¶ 12). The defendants have marketed the advantages of such long-term ownership of funds (*Id.*). Plaintiffs have brought claims against Defendants alleging that Defendants' allowance of short-term buying and selling by some investors wrongfully led to the dilution of Plaintiffs' rights and equity in the Defendants' stocks.

Columbia Acorn Trust is a Massachusetts business trust with its principal place of business in Chicago, Illinois (Complaint ¶ 2). Defendant Columbia Wanger Asset Management is a Delaware partnership with is [*sic*] principal place of business in Chicago, Illinois (*Id.* ¶ 3). Defendant Columbia Wanger Asset Management is responsible for managing and supervising Columbia Acorn International's portfolio of securities (*Id.*).

II. Analysis

Defendants may remove this case to this court only if the federal district courts would have original jurisdiction over the action. **See 28 U.S.C. § 1441; *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987)**. "[T]he burden of establishing federal jurisdiction falls on the party seeking removal." ***Doe v. Allied Signal, Inc.*, 985 F.2d 908, 911 (7th Cir. 1993)**.

The general rule is that a plaintiff is the master of his own complaint and can avoid federal question jurisdiction by pleading exclusively state law claims. ***See Caterpillar*, 482 U.S. at 392; *Franchise Tax Bd. v.***

***Construction Laborers Vacation Trust for S. Cal.*, 463 U.S. 1, 10 103 (1983); *Bastien v. AT&T Wireless Services, Inc.*, 205 F.3d 983, 986 (7th Cir. 2000)**. If the plaintiff's claim arises under state law, the mere assertion of federal preemption as a defensive argument – sometimes called "conflict preemption" – will not confer federal question jurisdiction. ***Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. at 63-64 (1987); *Franchise Tax Bd. of Cal.*, 463 U.S. at 9-12**. "Complete preemption," on the other hand, is the doctrine which recognizes that federal law may sometimes so completely preempt a particular area that any civil complaint raising this select group of claims is necessarily federal in character. ***Metropolitan Life*, 481 U.S. at 63-64**.

First, Defendants maintain that the allegations in Plaintiffs' complaint satisfy SLUSA's "in connection with" requirement.

The Court rejects this argument. SLUSA allows removal to federal court of certain class actions based on state law. **15 U.S.C. § 78bb(f). *Accord Professional Mgt Associates, Inc. Employees' Profit Sharing Plan v. KPMG, LLP*, 335 F.3d 800, 802 (8th Cir. 2003)**. SLUSA was enacted to prevent plaintiffs from seeking to evade the protections that federal law provides against abusive litigation by filing suit in state court. ***Newby v. Enron Corp.*, 338 F.3d 467, 471 (5th Cir. 2003)**. The primary way SLUSA accomplishes this objective is by preempting certain securities fraud class actions brought under state law. ***Id.*** The Eighth Circuit Court of Appeals stated:

> With some exceptions, SLUSA made the federal courts the exclusive fora for most class actions involving the purchase and sale of securities. Primarily, SLUSA mandates that any class action based on an allegation that a "covered security" was sold [or purchased] through misrepresentation, manipulation, or deception shall be removable to federal court.

***Green v. Ameritrade, Inc.*, 279 F.3d 590, 595-596 (8th Cir. 2002).**

However, not all securities claims are preempted by SLUSA. A party claiming SLUSA preemption must demonstrate that the claim satisfies the following:

> (1) the action is a "covered class action" under SLUSA, (2) the action purports to be based on state law, (3) the defendant is alleged to have misrepresented or omitted a material fact (or to have used or employed any manipulative or deceptive device or contrivance), and the defendant is alleged to have engaged in conduct described by criterion (3) "in connection with" the purchase or sale of a "covered security."

***Id.* at 595 (citing 15 U.S.C. §§ 78bb(f)(1)-(2).**

Based on the following, the Court finds that Defendants have not met the fourth requirement for SLUSA preemption. Plaintiffs' claims are not claims "in connection with the purchase or sale of a covered security." There is no claim asserted by a purchaser or seller; the claims are brought by those who held shares. If a claim is not cognizable under Section 10(b)(5) of the Securities and Exchange Act of 1934 because not "in connection the [*sic*] purchase or sale of a covered security," it similarly is not a claim "in connection with the purchase or sale of a covered security" for SLUSA purposes.

Recently, the Honorable Michael J. Reagan addressed this exact issue in ***Bradfisch v. Templeton Funds, Inc., et al.*, 03-CV-0760-MJR (January 23, 2004)** and found that SLUSA does *not* preempt state law claims of breach of fiduciary duty.[2] Judge Reagan held:

> "Bradfisch claims dilution of his ownership interests and voting rights. Bradfisch's complaint alleges dilution claims that only a holder of securities can

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[2] The Bradfisch allegations and the allegations of this case are almost identical.

bring. Such claims are not actionable under the Securities and Exchange Act of 1934. State law, not the 1934 Act, provides the remedy sought by Bradfisch and the class of holders he seeks to represent. Bradfisch's claims cannot be removed under SLUSA."

***Bradfisch*, 2003-CV-0760 (Doc. 18, p. 6)**. This Court agrees with Judge Reagan's reasoning and finds that SLUSA does not permit removal of Plaintiffs' claims.

Second, Defendants maintain that removal was proper because a substantial federal question is presented on the face of Plaintiffs' complaint, namely the Investment Company Act of 1940, **15 U.S.C. §§ 80a-1, *et seq.* ("ICA")**.

The Court rejects this argument. Again, the Court agrees with Judge Reagan's ruling in ***Bradfisch*** on this issue. ***Bradfisch*, 2003-CV-0760 (Doc. 18, p. 7)**. As in ***Bradfisch***, the Plaintiffs have not asserted claims under the ICA and Defendants have not identified any provision of the ICA which would render their state law claims removable to this Court.

III. Conclusion

Accordingly, the Court **REMANDS** this case *sua sponte* based on lack of subject matter jurisdiction. Further, the Court **DENIES as moot** all other pending motions (Doc. 15, 19, 23, 25).

IT IS SO ORDERED.

Signed this 12th day of February, 2004.

/s/ DAVID R. HERNDON
DAVID R. HERNDON
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

No. 04-CV-00056-DRH

AVERY JACKSON, INDIVIDUALLY AND
ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Plaintiffs,

v.

VAN KAMPEN SERIES FUND, INC. AND
VAN KAMPEN INVESTMENT ADVISORY CORP.,
Defendants.

[Filed Apr. 1, 2004]

MEMORANDUM AND ORDER

HERNDON, District Judge:

I. Introduction

On December 18, 2003, Avery Jackson filed this purported class action in the Circuit Court of Madison County, Illinois against Van Kampen Series Fund, Inc. ("Van Kampen Funds") and Van Kampen Investment Advisory Corporation ("Van Kampen Advisor") alleging state law claims of breach of fiduciary duty in connection with the dilution of shares he held in certain mutual fund accounts managed by Defendants. **(Doc. 2)**. Defendants removed the case to this Court based on federal question jurisdiction, **28 U.S.C. § 1331**. **(Doc. 1)**.

Now before the Court are Plaintiff's motions to remand for lack of subject matter jurisdiction **(Doc. 13)** and to accelerate briefing and hearing on motion to remand for lack of subject matter jurisdiction. **(Doc. 18)**. As Plaintiff points out, the Court has already had several opportuni-

ties to consider its jurisdiction over allegations virtually identical to those alleged here, and has found it lacked jurisdiction. ***Potter v. Janus Investment Fund, et al.*, 03-CV-00692-DRH (S.D. Ill. Feb. 9, 2004); *Parthasarthy v. T. Rowe Price Int'l Funds, Inc., et al.*, 03-CV-00673-DRH (S.D. Ill. Jan. 30, 2004); *Kircher v. Putnam Funds Trust, et al.*, 03-CV-00691-DRH (S.D. Ill. Jan. 27, 2004).**[1] As in these other cases, the Court rejects Defendants' argument that the Court has jurisdiction under the Securities Litigation Uniform Standards Act of 1998 ("SLUSA") or because the Complaint presents a substantial federal question, and remands the matter to the Circuit Court of Madison County, Illinois.

II. Background

Plaintiff is a mutual fund investor who held shares in the funds managed by Defendants for the purpose of long-term investing in international securities. Defendants' funds are involved in the purchase of foreign securities principally traded in securities markets outside of the United States. Shares of these open end mutual funds are sold to investors at a price based upon the net asset value ("NAV") per share. NAV depends upon the fluctuating value of the fund's underlying portfolio securities. Defendants set this price once every business day at the close of trading on the New York Stock Exchange at 4:00 p.m. Eastern Time.

Plaintiff alleges that since many of the home markets for the foreign securities in Defendants' asset portfolio trade before Defendants set the NAV, the closing prices

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[1] The Court's decisions are in accord with those of the other judges in this judicial district. ***See, e.g., Kwiatkowski v. Templeton Growth Fund, Inc., et al.*, 04-CV-0038-GPM (S.D. Ill. Feb. 3, 2004) (Murphy, C.J.); *Woodbury v. Templeton Global Smaller Cos. Fund, Inc., et al.*, 03-00761-GPM (S.D. Ill. Jan. 29, 2004) (Murphy, C.J.); *Dudley v. Putnam Int'l Equity Fund, et al.*, 03-00852-GPM & 03-00853-GPM (S.D. Ill. Jan. 27, 2004) (Murphy, C.J.); *Bradfisch v. Templeton Funds, Inc.*, 03-CV-00760-MJR (S.D. Ill. Jan. 23, 2004) (Reagan, J.).**

used to calculate the NAV are stale and do not reflect the price relevant information available. For example, during the interval that elapses between when Defendants set their share NAV "and release it to the NASD for communication to the public," securities markets in countries such as the United Kingdom, France, Japan, Russia, Malaysia, Germany, and Australia have already traded for an entire session.

In other words, Plaintiff alleges that by failing to make daily adjustments based upon positive correlations between the upward or downward movements in United States and foreign markets and by choosing to use stale prices in valuing their fund shares and setting the daily NAVs, Defendants have exposed long-term shareholders (such as Plaintiff) to market timing traders who take advantage of Defendants' stale pricing and obtain excess profits at the expense of shareholders who are non-trading long-term buy-and-hold investors.

III. Analysis

Defendants may remove this case to this Court only if the federal district courts would have original jurisdiction over the action. ***See* 28 U.S.C. § 1441; *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987)**. "[T]he burden of establishing federal jurisdiction falls on the party seeking removal." ***Doe v. Allied Signal, Inc.*, 985 F.2d 908, 911 (7th Cir. 1993)**. Because Defendants do not contend that diversity exists, removal is appropriate only if Plaintiff's claims arise under federal law. ***See Fedor v. Cingular Wireless Corp.*, 355 F.3d 1069, 1071 (7th Cir. 2004).**

The general rule is that a plaintiff is the master of his own complaint and can avoid federal question jurisdiction by pleading exclusively state law claims. ***See Caterpillar, Inc.*, 482 U.S. at 392; *Franchise Tax Bd. v. Construction Laborers Vacation Trust for S. Cal., et al.*, 463 U.S. 1, 10 (1983); *Bastien v. AT&T Wireless Services, Inc.*, 205 F.3d 983, 986 (7th Cir. 2000)**. Indeed, "[c]ourts have long recognized . . . that a plaintiff who has both state and federal claims available may avoid federal

court by limiting his or her complaint to only state law claims." ***Fedor*, 355 F.3d at 1071**. If the plaintiff's claim arises under state law, the mere assertion of federal preemption as a defensive argument – sometimes called "conflict preemption" – will not confer federal question jurisdiction. ***Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. at 63-4 (1987); *Franchise Tax Bd. of State of Cal.*, 463 U.S. at 9-12**. "Complete preemption," on the other hand, is the doctrine which recognizes that federal law may sometimes so completely preempt a particular area that any civil complaint raising this select group of claims is necessarily federal in character. ***Metropolitan Life*, 481 U.S. at 63-4**.

With this in mind, the Court turns to Defendants' arguments. First, Defendants maintain that the allegations in Plaintiff's Complaint satisfy SLUSA's "in connection with" requirement because the Complaint alleges a "unitary scheme of fraud." SLUSA provides for the removal to federal court of certain class actions based on state law. **15 U.S.C. § 78bb(f)**. ***Accord Professional Mgt Associates, Inc. Employees' Profit Sharing Plan v. KPMG, LLP*, 335 F.3d 800, 802 (8th Cir. 2003)**. SLUSA was enacted to prevent plaintiffs from seeking to evade the protections that federal law provides against abusive litigation by filing suit in state court. ***Newby v. Enron Corp.*, 338 F.3d 467, 471 (5th Cir. 2003)**. The primary way SLUSA accomplishes this objective is by preempting certain securities fraud class actions brought under state law. ***Id.*** The Eighth Circuit Court of Appeals stated:

> With some exceptions, SLUSA made the federal courts the exclusive fora for most class actions involving the purchase and sale of securities. Primarily, SLUSA mandates that any class action based on an allegation that a 'covered security' was sold [or purchased] through misrepresentation, manipulation, or deception shall be removable to federal court.

***Green v. Ameritrade, Inc.*, 279 F.3d 590, 595-596 (8th Cir. 2002).**

However, not all securities claims are preempted by SLUSA. A party claiming SLUSA preemption must demonstrate that the claim satisfies the following:

> (1) the action is a 'covered class action' under SLUSA, (2) the action purports to be based on state law, (3) the defendant is alleged to have misrepresented or omitted a material fact (or to have used or employed any manipulative or deceptive device or contrivance), and the defendant is alleged to have engaged in conduct described by criterion, and (4) 'in connection with' the purchase or sale of a 'covered security.'

***Id.* at 595 (citing 15 U.S.C. §§ 78bb(f)(1)-(2)).** If a claim is not cognizable under Section 10(b)(5) of the Securities and Exchange Act of 1934 because it is not "in connection the [*sic*] purchase or sale of a covered security," it similarly is not a claim "in connection with the purchase or sale of a covered security" for SLUSA purposes.

Here, the Court find [*sic*] Plaintiff's claims are not claims "in connection with the purchase or sale of a covered security" for purposes of SLUSA preemption. Plaintiff alleges negligence and gross negligence in connection with the dilution of shares held in certain mutual fund accounts managed by Defendants. Defendants attempt to characterize Plaintiff's allegations as a "unitary scheme of fraud" does not change this result. As Judge Reagan explained:

> [Plaintiff's] claims dilution of his ownership interests and voting rights. [Plaintiff's] complaint alleges dilution claims that only a holder of securities can bring. Such claims are not actionable under the Securities and Exchange Act of 1934. State law, not the 1934 Act, provides the remedy sought by [Plaintiff] and the class of holders he seeks to represent. [Plaintiff's] claims cannot be removed under SLUSA.

***Bradfisch*, 03-CV-00760 (Doc. 18, p. 6)**. This Court agrees with Judge Reagan's reasoning and finds that SLUSA does not permit removal of Plaintiff's claims.

Second, Defendants maintain that removal was proper because a substantial federal question is presented. As an initial matter, the Court questions whether the doctrine of substantial federal question remains viable in light of the Supreme Court's decision in ***Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1 (2003)**. But in any event, the Court finds the doctrine inapplicable here.

IV. Conclusion

Accordingly, the Court **GRANTS** Plaintiff's motion to remand. **(Doc. 13)**. Because the Court lacks subject matter jurisdiction, the Court **REMANDS** this action to the Circuit Court of Madison County, Illinois. The Court **DENIES as moot** Plaintiff's motion to accelerate briefing and hearing on motion to remand for lack of subject matter jurisdiction. **(Doc. 18)**.

IT IS SO ORDERED.

Signed this 1st day of April, 2004.

/s/ DAVID R. HERNDON
DAVID R. HERNDON
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

Case No. 04-cv-0355-MJR

TERRY SPURGEON,
Plaintiff,

v.

PACIFIC LIFE INS. CO.,
Defendant.

[Filed June 24, 2004]

MEMORANDUM AND ORDER

REAGAN, District Judge:

Terry Spurgeon of Moro, Illinois purchased a "flexible premium deferred variable annuity" from Pacific Life Insurance Company for his son. In May 2004, Spurgeon filed a putative class action suit against Pacific Life in the Circuit Court of Madison County, Illinois. The lawsuit challenges Pacific Life's use of "stale" information to value the assets of the mutual funds in which Pacific Life's annuity sub-accounts are invested.

More specifically, Spurgeon's complaint alleges that Pacific Life negligently calculated the net asset value of sub-accounts, negligently permitted market-timed trades, and breached its fiduciary duty to investors. The complaint, which alleges only state law claims, bears striking similarities to other recently removed class actions challenging portfolio valuation and share pricing policies, such as ***Bradfisch v. Templeton Funds, Inc.*, Case No. 03-cv-0760-MJR**.

One month ago, Pacific Life removed the action to this United States District Court, invoking subject matter jurisdiction under both the federal question and diversity statutes, **28 U.S.C. § 1331, § 1332**. Threshold review of the case raised jurisdictional questions and concerns.

By Order dated May 26, 2004, the Court directed Plaintiff Spurgeon to file a jurisdictional memorandum addressing the arguments presented in Pacific Life's removal notice. Spurgeon did so. *See* Doc. 20. Pacific Life obtained leave to file a reply brief on June 23, 2004. *See* Doc. 25.

Having carefully reviewed the complaint, the jurisdictional allegations in Pacific Life's notice of removal, Spurgeon's responsive jurisdictional memorandum, and Pacific Life's reply brief, the Court determines that subject matter jurisdiction does not lie here.

First, the Court turns to Pacific Life's contention that diversity jurisdiction exists. **28 U.S.C. § 1332** confers original jurisdiction on federal district courts over suits in which the amount in controversy exceeds $75,000, and the action is between citizens of different states. The party invoking federal jurisdiction (here, Pacific Life) bears the burden of demonstrating that all jurisdictional requirements have been met. ***Chase v. Shop 'N Save Warehouse Foods, Inc.*, 110 F.3d 424, 427 (7th Cir. 1997)**.

Pacific Life is a citizen of California, both incorporated and having its principal place of business in that state. Plaintiff Spurgeon is an Illinois citizen.[1] Diversity appears to be complete. However, the amount in controversy does not exceed $75,000.

For a defendant to successfully remove a *class* action based on diversity, at least one of the named plaintiffs must have a claim that surpasses the $75,000 jurisdictional bar. ***In re Brand Name Prescription Drugs An-***

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[1] Spurgeon sues as custodian of his son, James. The pleadings before the Court indicate that, although James was a minor at the time Spurgeon purchased the annuity in question, James was not a minor at the time this suit was filed.

***titrust Litigation*, 123 F.3d 599, 607 (7th Cir. 1997), *cert. denied*, 522 U.S. 1153 (1998); *Garbie v. Daimler-Chrysler Corp.*, 211 F.3d 407, 409 (7th Cir. 2000).** If one named plaintiff meets the jurisdictional minimum, the other named plaintiffs and class members can "piggyback" on that plaintiff's claim, via supplemental jurisdiction under **28 U.S.C. § 1367**. ***Brand Name*, 123 F.3d at 607**.

Spurgeon's complaint expressly states that he and similarly situated investors have suffered damages *less than* $75,000 "per plaintiff or class member, including all compensatory damages and costs." Doc. 2, p. 13. Scrutiny of the complaint confirms that statement. Additionally, Pacific Life cannot aggregate the various Plaintiffs' claims to satisfy the amount-in-controversy requirement. ***See, e.g., Del Vecchio v. Conseco, Inc.*, 230 F.3d 974, 977 (7th Cir. 2000)**. Thus, not all requirements for diversity jurisdiction have been met, and subject matter jurisdiction cannot be exercised via **28 U.S.C. § 1332**.

Similarly unavailing are Pacific Life's invocations of jurisdiction under the federal question statute, **28 U.S.C. § 1331**. Key to the Court's analysis is the characterization of Spurgeon's claims as "dilution" claims. Spurgeon alleges that Pacific Life's use of mutual fund net asset values "based upon stale prices of foreign securities" allows market timers to buy discounted units and thereby dilute the ownership interests of *other* sub-account holders (non market timers like Spurgeon). *See* Doc. 1, ¶ 35. As this Court held in ***Bradfisch*** (and a number of similar decisions), dilution claims brought by *holders* such as Spurgeon are not removable under the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"), **15 U.S.C. § 77, *et seq.***

SLUSA preempts (and thereby permits removal of) certain securities fraud class actions brought under state law. **15 U.S.C. § 78bb(f); *Professional Mgt Associates, Inc. Employees' Profit Sharing Plan v. KPMG, LLP*, 335 F.3d 800, 802 (8th Cir. 2003); *Newby v. Enron Corp.*, 338 F.3d 467, 471 (5th Cir. 2003)**.

As explained in detail in this Court's January 23, 2004 Order in ***Bradfisch***, though, not *all* state law-based securities claims are preempted by SLUSA. A party claiming SLUSA preemption must establish four criteria: (1) that the action is a "covered class action" under SLUSA; (2) that the action purports to be based on state law; (3) that the defendant is alleged to have misrepresented or omitted a material fact (or to have used a manipulative or deceptive device); and (4) that the defendant is alleged to have engaged in this conduct "in connection with" the purchase or sale of a covered security. ***Green v. Ameritrade, Inc.*, 279 F.3d 590, 595-96 (8th Cir. 2002)**.

If a claim is not cognizable under Section 10(b)(5) of the Securities and Exchange Act of 1934 because it is not a claim "in connection with the purchase or sale of a covered security," then that claim does not meet the fourth prong of the above-stated test (*i.e.*, it is not a claim "in connection with the purchase or sale of a covered security" for SLUSA purposes). Here, Spurgeon brings dilution claims as a *holder* of securities (*i.e.*, a holder of sub-account units). He does not assert any claim as a *purchaser* or *seller* of Pacific Life products. Spurgeon's state law claims are not cognizable under the 1934 Act, and SLUSA does not preempt them.

Nor does the Court find merit in Pacific Life's other preemption arguments for federal question jurisdiction. **28 U.S.C. 1331** confers original jurisdiction on the federal district courts over all civil actions arising under the Constitution or laws of the United States. In assessing the propriety of removal based on federal question jurisdiction, the district court applies the well-pleaded complaint rule, which provides that a "cause of action arises under federal law only when the plaintiff's well-pleaded complaint raises issues of federal law." ***Moran v. Rush Prudential HMO, Inc.*, 230 F.3d 959, 966 (7th Cir. 2000), *citing Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 61 (1987)**.

Under the well-pleaded complaint rule, this Court examines the state court complaint, not the defendant's

response, "to determine whether the plaintiff's claim falls under federal question jurisdiction." ***Id.*** A federal defense to a claim arising under state law does not create jurisdiction "and therefore does not authorize removal." ***Moran*, 230 F.3d at 967, *citing Blackburn v. Sundstrand Corp.*, 115 F.3d 493, 495 (7th Cir.), *cert denied*, 522 U.S. 997 (1997).**

Similarly insufficient is the fact that a federal question may be implicit in a plaintiff's claim. ***See Doe v. Allied-Signal, Inc.*, 985 F.2d 908, 911 (7th Cir. 1993).** Indeed a plaintiff who has both federal and state causes of action may ignore the federal claims and pursue only the state claims in state court. ***Illinois v. Kerr-McGee Chemical Co.*, 677 F.2d 571, 575 (7th Cir.), *cert. denied*, 459 U.S. 1049 (1982).**

Here, Spurgeon's complaint contains only state law claims. Pacific Life, however, maintains (Doc. 1, p. 5): "This Court has federal question jurisdiction because the asserted state law claims are completely preempted by the National Securities Markets Improvements Act of 1996 ("NSMIA"), . . . codified at 15 U.S.C. § 77r, and by the Investment Company Act of 1940 ("ICA"), codified at 15 U.S.C. § 80a-1, *et seq.*"

Sometimes referred to as a corollary to the well-pleaded complaint rule, the "complete preemption doctrine" governs state law claims which Congress has so completely preempted that it is proper to re-cast those state claims as federal claims. ***Moran*, 230 F.3d at 967; *Lister v. Stark*, 890 F.2d 941, 943 n.l (7th Cir. 1989).**

Roughly two years ago, the United States Court of Appeals for the Seventh Circuit reversed this Court's determination that plaintiffs' state law claims in a putative class action were "completely preempted" by federal law and thus properly removed here. The Seventh Circuit instructed this Court to remand the case to Illinois state court for lack of subject matter jurisdiction. ***Rogers v. Tyson Foods, Inc.*, 308 F.3d 785 (7th Cir. 2002).**

Reiterating that the doctrine of complete preemption is a corollary to the well-pleaded complaint rule, the Court declared:

> Complete, or field, preemption exists where "Congress has so completely preempted a particular area that no room remains for any state regulation and the complaint would be 'necessarily federal in character.'" *Bastien v. AT&T Wireless Serv., Inc.*, 205 F.3d 983, 986 (7th Cir. 2000) (quoting *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 63-64 (1987)). We find complete preemption where there is a "congressional intent in the enactment of a federal statute not just to provide a federal defense to a state created cause of action but to grant a defendant the ability to remove the adjudication of the cause of action to a federal court *by transforming the state cause of action into a federal cause of action*." 14B Charles Alan Wright, Arthur R. Miller, & Edward H. Cooper, *Federal Practice and Procedure* § 3722.1 (3d Ed. 1998 & Supp. 2002) . . . .

***Rogers*, 308 F.3d at 787-88 (italics in original).**

The Court continued: "Preemption is what wipes out state law, but the foundation for removal is the creation of federal law to replace state law." ***Id.* at 788**. In simplest terms, the lack of a private right of action under federal law doomed the Rogers defendants' removal attempt: "The 'something more . . . required to create removal jurisdiction' includes a private right of action under the federal statute." ***Id.* at *4**. ***See also Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804 (1986) (plaintiff's success depended upon a favorable interpretation of federal drug-safety laws, but state law supplied the right to recover damages; Court held that the presence of a federal issue in a claim that depended on state law did not make the claim one "arising under" federal law).**

In this case at bar, Pacific Life has not addressed this aspect of complete preemption. Pacific Life simply argues

that NSMIA and ICA "wholly displace state jurisdiction over the matters plaintiff raises" (Doc. 1, pp. 5-6). Countering this argument is a provision of ICA which indicates that, in enacting the ICA, Congress intended to preserve existing state law causes of action rather than completely displace them. **15 U.S.C. § 80a-49** provides:

> [N]or shall anything in this subchapter affect the jurisdiction of any other . . . State . . . over any person, security, or transaction, insofar as such jurisdiction does not conflict with any provision of this subchapter or of any rule, regulation, or order hereunder.

Stated simply, the instant case involves state law claims for negligence, gross negligence, and breach of fiduciary duties. Spurgeon's claims neither "arise under" federal law nor are completely preempted by federal law (SLUSA, NSMIA, or ICA). Moreover, as noted above, the amount in controversy does not suffice for jurisdiction to lie under the federal diversity statute.

Because it lacks subject matter jurisdiction, the Court (having permitted the parties to fully brief the issues) sua sponte **REMANDS** this case to the Circuit Court of Madison County, Illinois.

Finally, as Spurgeon's counsel did not request such an award in its jurisdictional brief urging remand, the Court **DECLINES** to charge Pacific Life, under **28 U.S.C. § 1447(c)**, the removal costs incurred by Spurgeon.

IT IS SO ORDERED.

DATED this 24th day of June, 2004.

/s/ MICHAEL J. REAGAN
MICHAEL J. REAGAN
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 04-1495, 04-1496, 04-1608, 04-1628, 04-1650, 04-1651, 04-1660, 04-1661, 04-2162, 04-2687

CARL KIRCHER AND ROBERT BROCKWAY, INDIVIDUALLY AND ON BEHALF OF A CLASS, ET AL.,
Plaintiffs-Appellees,

v.

PUTNAM FUNDS TRUST AND PUTNAM INVESTMENT MANAGEMENT, LLC, ET AL.,
Defendants-Appellants.

Appeals from the United States District Court
for the Southern District of Illinois

Nos. 03-CV-0691-DRH *et al.*
G. Patrick Murphy, *Chief Judge*, and
David R. Herndon and Michael J. Reagan, *Judges*.

May 2, 2005

Before: EASTERBROOK, RIPPLE, and WOOD, Circuit Judges.

Order

Plaintiffs-appellees filed a petition for rehearing and rehearing en banc on April 19, 2005. No judge in regular active service has requested a vote on the petition for rehearing en banc,* and all of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.

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* Chief Judge Flaum and Judges Rovner and Williams took no part in the consideration of this matter.

IN THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

Cause No. 03-L-1255

CARL KIRCHER AND ROBERT BROCKWAY,
INDIVIDUALLY AND ON BEHALF OF ALL OTHERS
SIMILARLY SITUATED,
Plaintiffs,

v.

PUTNAM FUNDS TRUST, A BUSINESS TRUST,
PUTNAM INVESTMENT MANAGEMENT, LLC,
EVERGREEN INTERNATIONAL TRUST, A BUSINESS TRUST, AND
EVERGREEN INVESTMENT MANAGEMENT COMPANY, LLC,
Defendants.

[Filed Sept. 16, 2003]

COMPLAINT

* * * * *

17. Studies of world financial markets have established associations between the value changes among various markets. There is a positive correlation between value movements in the United States market and value movements in foreign markets. If the United States market experiences an upward movement in values, it can be predicted that Asian markets will move upward once trading begins their next day. The same upward movement can be predicted for European markets once trading begins their next day. Similarly, if the United States market experiences a downward movement in values, it can be predicted that Asian and European markets will move downward once trading begins their next day. Because of these positive correlations, the closing prices of the foreign

securities in the underlying portfolio may not reflect current market values at the time Defendants set their fund NAV. Appropriate adjustments need to be made to the closing prices of the foreign securities in order to reflect current market values. Despite knowledge of the United States market result, the positive correlations and the stale price of the foreign securities in its underlying portfolio, Defendants do not make any value adjustment to the portfolio's foreign securities prior to calculating fund NAV and setting share price every business day.

* * * * *

32. A significant portion of the underlying foreign securities in the Defendants' portfolios are listed on foreign exchanges and trade during each market's respective session. The NAVs set by Defendants do not take into account on a daily basis any price relevant information that has become available in this two to fourteen and one/half hour interval, after the final prices for the underlying foreign securities have been posted but, prior to the setting of the NAVs. Such price relevant information impacts the valuation of these underlying foreign securities and is significant for valuation because the final market prices have become stale and do not reflect the current market value of the securities.

33. By failing to make daily adjustments based upon positive correlations between upward or downward movements in United States and foreign markets and by choosing to use stale prices in valuing their fund shares and setting their daily NAVs, Defendants have exposed long term shareholders to market timing traders who regularly purchase and redeem Defendants' shares as part of a profitable trading strategy. The market timing trading strategy stems from the ability of market timing traders to predict changes in the NAV. Market timing traders are able to predict changes in the NAV because of the positive correlations between value movements in United States markets and foreign markets. The stale price strategy of market timers who trade Defendants' shares is to buy shares

on days when the United States market moves up and to sell (redeem) shares when the United States market moves down. In order to derive maximum benefit from price relevant information developed subsequent to the now stale closing prices of the portfolio securities, market timers wait until the fund deadline for buying or selling (redeeming) shares in Defendants' funds on any particular business day. Because Defendants cannot buy or sell the foreign securities in the funds' underlying portfolio (due to the time difference between New York and the home markets of the foreign securities) at the time it sets the daily NAV that values the shares it issues and redeems, the shares that Defendants issue to and redeem from market timers do not reflect current market prices of the foreign securities held by the fund.

* * * * *

41. Plaintiffs bring this complaint as a class action against Defendants PUTNAM FUNDS, PUTNAM FUNDS MANAGER, EVERGREEN FUNDS, EVERGREEN FUNDS MANAGER, and pursuant to § 5/2-801 et seq., of the Illinois Code of Civil Procedure individually and on behalf of a class of all persons in the United States who have owned shares in Putnam International Growth & Income or Evergreen International Growth for more than fourteen days from the date of purchase to the date of sale (redemption) or exchange ("long term shareholders"). The class period commences five years prior to the filing of this complaint through the date of filing. Excluded from the class are Defendants, any parent, subsidiary, affiliate, or controlled person of Defendants, as well as the officers, directors, agents, servants or employees of Defendants, and the immediate family member of any such person. Also excluded is any judge who may preside over this case.

* * * * *

Count I

COMES NOW Plaintiff CARL KIRCHER, individually and on behalf of all others similarly situated, by and through his undersigned counsel, and for Count I of his Complaint against Defendants PUTNAM FUNDS TRUST and PUTNAM INVESTMENT MANAGEMENT, LLC, states as follows:

* * * * *

55. Defendants knew, or were negligent in not knowing, that the closing prices for the foreign securities represented in the Putnam International Growth & Income Fund and used by Defendants to calculate NAV for said Fund did not represent fair value because, inter alia, those prices did not reflect changes in trading prices as a result of trading which Defendants knew, or were negligent in not knowing, occurred daily after the closing of the New York Stock Exchange.

56. Defendants breached their duties of due care owed to Plaintiff KIRCHER and similarly situated owners of the Putnam International Growth & Income Fund by, inter alia:

i. failing to properly evaluate on a daily basis whether a significant event affecting the value of Putnam International Growth & Income's portfolio of securities had occurred after the foreign trading markets for such securities had closed but before Defendants calculated NAV and share prices;

ii. failing to implement Putnam International Growth & Income's portfolio valuation and share pricing policies and procedures; and

iii. allowing portfolio valuation and share pricing policies and procedures which benefited market timing traders of Putnam International Growth & Income's shares at the expense of long term shareholders.

* * * * *

Count II

COMES NOW Plaintiff CARL KIRCHER, individually and on behalf of all others similarly situated, by and through his undersigned counsel, and for Count II of his Complaint against Defendants PUTNAM FUNDS TRUST and PUTNAM INVESTMENT MANAGEMENT, LLC, states as follows:

* * * * *

60. With utter indifference and conscious disregard for Plaintiff KIRCHER'S investment and the investments of similarly situated fund owners, Defendants willfully and wantonly breached their duties to Plaintiff KIRCHER and similarly situated owners by, inter alia:

i. failing to know and implement applicable rules and regulations concerning the calculation of NAV;

ii. failing to properly evaluate on a daily basis whether a significant event affecting the value of Putnam International Growth & Income's portfolio of securities had occurred after the foreign trading markets for such securities had closed but before Defendants calculated NAV and share prices;

iii. failing to implement Putnam International Growth & Income's portfolio valuation and share pricing policies and procedures; and

iv. allowing portfolio valuation and share pricing policies and procedures which benefited market timing traders of Putnam International Growth & Income's shares at the expense of long term shareholders.

* * * * *

IN THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

Cause No. 03-L-1254

ROBERT POTTER AND DOROTHY LEUTTINGER, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Plaintiffs,

v.

JANUS INVESTMENT FUND, A BUSINESS TRUST; JANUS CAPITAL MANAGEMENT, LLC; SCUDDER INTERNATIONAL FUND, INC., A CORPORATION; AND DEUTSCHE INVESTMENT MANAGEMENT AMERICAS, INC.,
Defendants.

[Filed Sept. 16, 2003]

COMPLAINT

* * * * *

17. Studies of world financial markets have established associations between the value changes among various markets. There is a positive correlation between value movements in the United States market and value movements in foreign markets. If the United States market experiences an upward movement in values, it can be predicted that Asian markets will move upward once trading begins their next day. The same upward movement can be predicted for European markets once trading begins their next day. Similarly, if the United States market experiences a downward movement in values, it can be predicted that Asian and European markets will move downward once trading begins their next day. Because of

these positive correlations, the closing prices of the foreign securities in the underlying portfolio may not reflect current market values at the time Defendants set their fund NAV. Appropriate adjustments need to be made to the closing prices of the foreign securities in order to reflect current market values. Despite knowledge of the United States market result, the positive correlations and the stale price of the foreign securities in its underlying portfolio, Defendants do not make any value adjustment to the portfolio's foreign securities prior to calculating fund NAV and setting share price every business day.

* * * * *

32. A significant portion of the underlying foreign securities in the Defendants' portfolios are listed on foreign exchanges and trade during each market's respective session. The NAVs set by Defendants do not take into account on a daily basis any price relevant information that has become available in this two to fourteen and one/half hour interval, after the final prices for the underlying foreign securities have been posted but, prior to the setting of the NAVs. Such price relevant information impacts the valuation of these underlying foreign securities and is significant for valuation because the final market prices have become stale and do not reflect the current market value of the securities.

33. By failing to make daily adjustments based upon positive correlations between upward or downward movements in United States and foreign markets and by choosing to use stale prices in valuing their fund shares and setting their daily NAVs, Defendants have exposed long term shareholders to market timing traders who regularly purchase and redeem Defendants' shares as part of a profitable trading strategy. The market timing trading strategy stems from the ability of market timing traders to predict changes in the NAV. Market timing traders are able to predict changes in the NAV because of the positive correlations between value movements in United States markets and foreign markets. The stale price strategy of market

timers who trade Defendants' shares is to buy shares on days when the United States market moves up and to sell (redeem) shares when the United States market moves down. In order to derive maximum benefit from price relevant information developed subsequent to the now stale closing prices of the portfolio securities, market timers wait until the fund deadline for buying or selling (redeeming) shares in Defendants' funds on any particular business day. Because Defendants cannot buy or sell the foreign securities in the funds' underlying portfolio (due to the time difference between New York and the home markets of the foreign securities) at the time it sets the daily NAV that values the shares it issues and redeems, the shares that Defendants issue to and redeem from market timers do not reflect current market prices of the foreign securities held by the fund.

* * * * *

41. Plaintiffs bring this complaint as a class action against Defendants JANUS FUNDS, JANUS FUNDS MANAGER, SCUDDER FUNDS and SCUDDER FUND MANAGER, and pursuant to § 5/2-801 et seq., of the Illinois Code of Civil Procedure individually and on behalf of a class of all persons in the United States who have owned shares in Janus Overseas or Scudder International for more than fourteen days from the date of purchase to the date of sale (redemption) or exchange ("long term shareholders"). The class period commences five years prior to the filing of this complaint. Excluded from the class are Defendants, any parent, subsidiary, affiliate, or controlled Person of Defendants, as well as the officers, directors, agents, servants or employees of Defendants, and the immediate family member of any such person. Also excluded is any judge who may preside over this case.

* * * * *

Count I

COMES NOW Plaintiff, ROBERT POTTER, individually and on behalf of all others similarly situation [*sic*], by and through his undersigned counsel, and for Count I of his Complaint against Defendants JANUS FUNDS and JANUS FUNDS MANAGER, states as follows:

* * * * *

55. Defendants knew, or were negligent in not knowing, that the closing prices for the foreign securities represented in the Janus Overseas Fund and used by Defendants to calculate NAV for said Fund did not represent fair value because, inter alia, those prices did not reflect changes in trading prices as a result of trading which Defendants knew, or were negligent in not knowing, occurred daily after the closing of the New York Stock Exchange.

56. Defendants breached their duties of due care owed to Plaintiff Potter and similarly situated owners of the Janus Overseas Fund by, inter alia:

i. failing to properly evaluate on a daily basis whether a significant event affecting the value of Janus Overseas' portfolio of securities had occurred after the foreign trading markets for such securities had closed but before Defendants calculated NAV and share prices;

ii. failing to implement Janus Overseas' portfolio valuation and share pricing policies and procedures; and

iii. allowing portfolio valuation and share pricing policies and procedures which benefited market timing traders of Janus Overseas shares' at the expense of long term shareholders.

* * * * *

Count II

COMES NOW Plaintiff, ROBERT POTTER, individually and on behalf of all others similarly situation [*sic*], by and through his undersigned counsel, and for Count II of his Complaint against Defendants JANUS FUNDS and JANUS FUNDS MANAGER, states as follows:

* * * * *

60. With utter indifference and conscious disregard for Plaintiff POTTER'S investment and the investments of similarly situated fund owners, Defendants willfully and wantonly breached their duties to Plaintiff POTTER and similarly situated owners by, inter alia:

i. failing to know and implement applicable rules and regulations concerning the calculation of NAV;

ii. failing to properly evaluate on a daily basis whether a significant event affecting the value of Janus Overseas' portfolio of securities had occurred after the foreign trading markets for such securities had closed but before Defendants calculated NAV and share prices;

iii. failing to implement Janus Overseas' portfolio valuation and share pricing policies and procedures; and

iv. allowing portfolio valuation and share pricing policies and procedures which benefited market timing traders of Janus Overseas' shares at the expense of long term shareholders.

* * * * *

Count III

COMES NOW Plaintiff, DOROTHY LEUTHINGER, individually and on behalf of all others similarly situated, by and through her undersigned counsel, and for Count III of her Complaint against Defendants SCUDDER FUNDS and SCUDDER FUND MANAGER, states as follows:

* * * * *

68. Defendants knew, or were negligent in not knowing, that the closing prices for the foreign securities represented in the Scudder International Fund and used by Defendants to calculate NAV for said Fund did not represent fair value because, inter alia, those prices did not reflect changes in trading prices as a result of trading which Defendants knew, or were negligent in not knowing, occurred daily after the closing of the New York Stock Exchange.

69. Defendants breached their duties of due care owed to Plaintiff LEUTTINGER and similarly situated owners of the Scudder International Fund by, inter alia:

i. failing to properly evaluate on a daily basis whether a significant event affecting the value of Scudder International's portfolio of securities had occurred after the foreign trading markets for such securities had closed but before Defendants calculated NAV and share prices;

ii. failing to implement Scudder International's portfolio valuation and share pricing policies and procedures; and

iii. allowing portfolio valuation and share pricing policies and procedures which benefited market timing traders of Scudder International's shares at the expense of long term shareholders.

* * * * *

Count IV

COMES NOW Plaintiff, DOROTHY LEUTTINGER, individually and on behalf of all others similarly situated, by and through her undersigned counsel, and for Count IV of her Complaint against Defendants SCUDDER FUNDS and SCUDDER FUND MANAGER, states as follows:

* * * * *

73. With utter indifference and conscious disregard for Plaintiff's investment and the investments of similarly situated fund owners, Defendants willfully and wantonly

breached their duties to Plaintiff LEUTTINGER and similarly situated owners by, inter alia:

i. failing to know and implement applicable rules and regulations concerning the calculation of NAV;

ii. failing to properly evaluate on a daily basis whether a significant event affecting the value of Scudder International's portfolio of securities had occurred after the foreign trading markets for such securities had closed but before Defendants calculated NAV and share prices;

iii. failing to implement Scudder International's portfolio valuation and share pricing policies and procedures; and

iv. allowing portfolio valuation and share pricing policies and procedures which benefitted market timing traders of Scudder International's shares at the expense of long term shareholders.

* * * * *

IN THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

Cause No. 03-L-1253

T.K. PARTHASARTHY, EDMUND WOODBURY, STUART ALLEN SMITH, AND SHARON SMITH, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Plaintiffs,

v.

T. ROWE PRICE INTERNATIONAL FUNDS, INC., A CORPORATION, T. ROWE PRICE INTERNATIONAL, INC., ARTISAN FUNDS, INC., A CORPORATION, ARTISAN PARTNERS LIMITED PARTNERSHIP, AIM INTERNATIONAL FUNDS, INC., A CORPORATION, AND AIM ADVISORS, INC.,
Defendants.

[Filed Oct. 3, 2003]

FIRST AMENDED COMPLAINT

* * * * *

22. Studies of world financial markets have established associations between the value changes among various markets. There is a positive correlation between value movements in the United States market and value movements in foreign markets. If the United States market experiences an upward movement in values, it can be predicted that Asian markets will move upward once trading begins their next day. The same upward movement can be predicted for European markets once trading begins their next day. Similarly, if the United States market experiences a downward movement in values, it can be

predicted that Asian and European markets will move downward once trading begins their next day. Because of these positive correlations, the closing prices of the foreign securities in the underlying portfolio may not reflect current market values at the time Defendants set their fund NAV. Appropriate adjustments need to be made to the closing prices of the foreign securities in order to reflect current market values. Despite knowledge of the United States market result, the positive correlations and the stale price of the foreign securities in its underlying portfolio, Defendants do not make any value adjustment to the portfolio's foreign securities prior to calculating fund NAV and setting share price every business day.

* * * * *

37. A significant portion of the underlying foreign securities in the Defendants' portfolios are listed on foreign exchanges and trade during each market's respective session. The NAVs set by Defendants do not take into account on a daily basis any price relevant information that has become available in this two to fourteen and one/half hour interval, after the final prices for the underlying foreign securities have been posted but, prior to the setting of the NAVs. Such price relevant information impacts the valuation of these underlying foreign securities and is significant for valuation because the final market prices have become stale and do not reflect the current market value of the securities.

38. By failing to make daily adjustments based upon positive correlations between upward or downward movements in United States and foreign markets and by choosing to use stale prices in valuing their fund shares and setting their daily NAVs, Defendants have exposed long term shareholders to market timing traders who regularly purchase and redeem Defendants' shares as part of a profitable trading strategy. The market timing trading strategy stems from the ability of market timing traders to predict changes in the NAV. Market timing traders are able to predict changes in the NAV because of the positive correla-

tions between value movements in United States markets and foreign markets. The stale price strategy of market timers who trade Defendants' shares is to buy shares on days when the United States market moves up and to sell (redeem) shares when the United States market moves down. In order to derive maximum benefit from price relevant information developed subsequent to the now stale closing prices of the portfolio securities, market timers wait until the fund deadline for buying or selling (redeeming) shares in Defendants' funds on any particular business day. Because Defendants cannot buy or sell the foreign securities in the funds' underlying portfolio (due to the time difference between New York and the home markets of the foreign securities) at the time it sets the daily NAV that values the shares it issues and redeems, the shares that Defendants issue to and redeem from market timers do not reflect current market prices of the foreign securities held by the fund.

* * * * *

46. Plaintiffs bring this complaint as a class action against Defendants T. ROWE PRICE FUNDS, T. ROWE PRICE FUND MANAGER, ARTISAN FUNDS, ARTISAN FUND MANAGER, AIM FUNDS, AND AIM FUND MANAGER, and pursuant to § 5/2-801 *et seq.*, of the Illinois Code of Civil Procedure individually and on behalf of a class of all persons in the United States who have owned shares T. ROWE PRICE INTERNATIONAL, ARTISAN INTERNATIONAL, AND AIM EUROPEAN GROWTH for more than fourteen days from the date of purchase to the date of sale (redemption) or exchange ("long term shareholders"). The class period commences five years prior to the filing of this complaint through the date of filing. Excluded from the class are Defendants, any parent, subsidiary, affiliate, or controlled person of Defendants, as well as the officers, directors, agents, servants or employees of Defendants, and the immediate family member of any such person. Also excluded is any judge who may preside over this case.

* * * * *

Count I

COMES NOW Plaintiff T.K. PARTHASARATHY, individually and on behalf of all others similarly situated, by and through his undersigned counsel, and for Count I of his Complaint against Defendants ARTISAN FUNDS and ARTISAN FUND MANAGER, states as follows:

* * * * *

59. Defendants knew, or were negligent in not knowing, that the closing prices for the foreign securities represented in the Artisan International Fund and used by Defendants to calculate NAV for said Fund did not represent fair value because, inter alia, those prices did not reflect changes in trading prices as a result of trading which Defendants knew, or were negligent in not knowing, occurred daily after the closing of the New York Stock Exchange.

60. Defendants breached their duties of due care owed to Plaintiff Parthasarathy and similarly situated owners of the Artisan International Fund by, inter alia:

i. failing to properly evaluate on a daily basis whether a significant event affecting the value of Artisan International's portfolio of securities had occurred after the foreign trading markets for such securities had closed but before Defendants calculated NAV and share prices;

ii. failing to implement Artisan International's portfolio valuation and share pricing policies and procedures; and

iii. allowing portfolio valuation and share pricing policies and procedures which benefited market timing traders of Artisan International's shares at the expense of long term shareholders.

* * * * *

Count II

COMES NOW Plaintiff T.K. PARTHASARATHY, individually and on behalf of all others similarly situated, by and through his undersigned counsel, and for Count II of his Complaint against Defendants ARTISAN FUNDS and ARTISAN FUND MANAGER, states as follows:

* * * * *

64. With utter indifference and conscious disregard for Plaintiff Parthasarathy's investment and the investments of similarly situated fund owners, Defendants willfully and wantonly breached their duties to Plaintiff Parthasarathy and similarly situated owners by, inter alia:

i. failing to know and implement applicable rules and regulations concerning the calculation of NAV;

ii. failing to properly evaluate on a daily basis whether a significant event affecting the value of Artisan International's portfolio of securities had occurred after the foreign trading markets for such securities had closed but before Defendants calculated NAV and share prices;

iii. failing to implement Artisan International's portfolio valuation and share pricing policies and procedures; and

iv. allowing portfolio valuation and share pricing policies and procedures which benefited market timing traders of Artisan International's shares at the expense of long term shareholders.

* * * * *

IN THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

Cause No. 03-L-1539

STEVE AND BETH DUDLEY,
INDIVIDUALLY AND ON BEHALF OF ALL OTHERS
SIMILARLY SITUATED,
Plaintiffs,

v.

PUTNAM INTERNATIONAL EQUITY FUND AND
PUTNAM INVESTMENT MANAGEMENT, LLC,
Defendants.

[Filed Nov. 10, 2003]

COMPLAINT

* * * * *

13. Studies of world financial markets have established associations between the value changes among various markets. There is a positive correlation between value movements in the United States market and value movements in foreign markets. If the United States market experiences an upward movement in values, it can be predicted that Asian markets will move upward once trading begins their next day. The same upward movement can be predicted for European markets once trading begins their next day. Similarly, if the United States market experiences a downward movement in values, it can be predicted that Asian and European markets will move downward once trading begins their next day. Because of these positive correlations, the closing prices of the foreign securities in the underlying portfolio may not reflect current market values at the time Defendants set their fund NAV.

Appropriate adjustments need to be made to the closing prices of the foreign securities in order to reflect current market values. Despite knowledge of the United States market result, continuous trading of the world equity indexes, ADRs, foreign currency futures markets and the correlations between the value of the fund's securities and these benchmarks, Defendants do not make any value adjustment to the portfolio's foreign securities prior to calculating fund NAV and setting share price every business day.

* * * * *

28. A significant portion of the underlying foreign securities in the Defendants' fund portfolio are listed on foreign exchanges and trade during each market's respective session. The NAVs set by Defendants do not take into account on a daily basis any price relevant information that has become available in this two to fourteen and one/half hour interval, after the final prices for the underlying foreign securities have been posted but, prior to the setting of the NAVs. Price relevant information, such as the continuous trading of world equity market indexes, ADRs, and foreign currency futures impacts the valuation of these underlying foreign securities and is significant for valuation because the final market prices have become stale and do not reflect the current market value of the securities.

29. By failing to make daily adjustments based upon positive correlations between upward or downward movements in United States and foreign markets and by choosing to use stale prices in valuing their fund shares and setting their daily NAVs, Defendants have exposed long term shareholders to market timing traders who regularly purchase and redeem Defendants' shares as part of a profitable trading strategy. The market timing trading strategy stems from the ability of market timing traders to predict changes in the NAV. Market timing traders are able to predict changes in the NAV because of the positive correlations between value movements in United States markets

and foreign markets. The stale price strategy of market timers who trade Defendants' fund shares is to buy shares on days when the United States market moves up and to sell (redeem) shares when the United States market moves down. In order to derive maximum benefit from price relevant information developed subsequent to the now stale closing prices of the portfolio securities, market timers wait until the fund deadline for buying or selling (redeeming) shares in Defendants' funds on any particular business day. Because Defendants cannot buy or sell the foreign securities in the fund's underlying portfolio (due to the time difference between New York and the home markets of the foreign securities) at the time it sets the daily NAV that values the shares it issues and redeems, the shares that Defendants issue to and redeem from market timers do not reflect current market prices of the foreign securities held by the fund.

* * * * *

37. Plaintiffs bring this complaint as a class action against Defendants Putnam International Equity Fund and Putnam Investment Management, LLC, and pursuant to § 5/2-801 et seq., of the Illinois Code of Civil Procedure individually and on behalf of a class of all persons in the United States who have held shares of Putnam International Equity Fund for more than fourteen days from the date of purchase to the date of sale (redemption) or exchange ("long term shareholders"). The class period commences five years prior to the filing of this complaint through the date of filing. Excluded from the class are Defendants, any parent, subsidiary, affiliate, or controlled person of Defendants, as well as the officers, directors, agents, servants or employees of Defendants, and the immediate family members of any such person. Also excluded is any judge who may preside over this case.

* * * * *

49. Defendants breached their duties of due care owed to Plaintiffs Steve and Beth Dudley and similarly situated

shareholders of the Putnam International Equity Fund by, inter alia:

a. failing to properly evaluate on a daily basis whether a significant event affecting the value of Putnam International Equity Fund's portfolio of securities had occurred after the foreign trading markets for such securities had closed but before Defendants calculated NAV and share prices;

b. failing to implement Putnam International Equity Fund's portfolio valuation and share pricing policies and procedures; and

c. allowing portfolio valuation and share pricing policies and procedures which benefited market timing traders of Putnam International Equity Fund's shares at the expense of long term shareholders.

* * * * *

COUNT II

Plaintiffs, Steve and Beth Dudley, individually and on behalf of all others similarly situated, by and through their undersigned counsel, and for Count II of their Complaint against Defendants Putnam International Fund and Putnam Fund Manager, state as follows:

* * * * *

53. Defendants knew, or were negligent in not knowing, that the closing prices for the foreign securities held by the Putnam International Equity Fund and used by Defendants to calculate NAV for said Fund did not represent current market value because, inter alia, those prices did not reflect changes in the fund's securities which occurred after the exchange on which those foreign securities trade closed and before defendants calculated NAV and share price.

54. With utter indifference and conscious disregard for Plaintiffs Steve and Beth Dudley's investment and the investments of similarly situated fund shareholders, De-

fendants willfully and wantonly breached their duties to Plaintiffs Steve and Beth Dudley and similarly situated shareholders by, inter alia:

a. failing to know and implement applicable rules and regulations concerning the calculation of NAV;

b. failing to properly evaluate on a daily basis whether a significant event affecting the value of Putnam International Equity Fund's portfolio of securities had occurred after the foreign trading markets for such securities had closed but before Defendants calculated NAV and share prices;

c. failing to implement Putnam International Equity Fund's portfolio valuation and share pricing policies and procedures; and

d. allowing portfolio valuation and share pricing policies and procedures which benefited market timing traders of Putnam International Equity Fund's shares at the expense of long term shareholders.

* * * * *

IN THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

Cause No. 03-L-1550

GARY VOGELER, INDIVIDUALLY AND
ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Plaintiff,

v.

COLUMBIA ACORN TRUST AND
COLUMBIA WANGER ASSET MANAGEMENT, LP,
Defendants.

[Filed Nov. 13, 2003]

COMPLAINT

* * * * *

13. Studies of world financial markets have established associations between the value changes among various markets. There is a positive correlation between value movements in the United States market and value movements in foreign markets. If the United States market experiences an upward movement in values, it can be predicted that Asian markets will move upward once trading begins their next day. The same upward movement can be predicted for European markets once trading begins their next day. Similarly, if the United States market experiences a downward movement in values, it can be predicted that Asian and European markets will move downward once trading begins their next day. Because of these positive correlations, the closing prices of the foreign securities in the underlying portfolio may not reflect current market values at the time Defendants set their fund NAV. Appropriate adjustments need to be made to the closing

prices of the foreign securities in order to reflect current market values. Despite knowledge of the United States market result, continuous trading of the world equity indexes, ADRs, foreign currency futures markets, and the correlations between the value of the fund's securities and these benchmarks, Defendants do not make any value adjustment to the portfolio's foreign securities prior to calculating fund NAV and setting share price every business day.

* * * * *

28. A significant portion of the underlying foreign securities in the Defendants' fund portfolio are listed on foreign exchanges and trade during each market's respective session. The NAVs set by Defendants do not take into account on a daily basis any price relevant information that has become available in this two to fourteen and one/half hour interval, after the final prices for the underlying foreign securities have been posted but, prior to the setting of the NAVs. Price relevant information, such as the continuous trading of world equity market indexes, ADRs, and foreign currency futures impacts the valuation of these underlying foreign securities and is significant for valuation because the final market prices have become stale and do not reflect the current market value of the securities.

29. By failing to make daily adjustments based upon positive correlations between upward or downward movements in United States and foreign markets and by choosing to use stale prices in valuing their fund shares and setting their daily NAVs, Defendants have exposed long term shareholders to market timing traders who regularly purchase and redeem Defendants' fund shares as part of a profitable trading strategy. The market timing trading strategy stems from the ability of market timing traders to predict changes in the NAV. Market timing traders are able to predict changes in the NAV because of the positive correlations between value movements in United States markets and foreign markets. The stale price strategy of

market timers who trade Defendants' shares is to buy shares on days when the United States market moves up and to sell (redeem) shares when the United States market moves down. In order to derive maximum benefit from price relevant information developed subsequent to the now stale closing prices of the portfolio securities, market timers wait until the fund deadline for buying or selling (redeeming) shares in Defendants' funds on any particular business day. Because Defendants cannot buy or sell the foreign securities in the funds' underlying portfolio (due to the time difference between New York and the home markets of the foreign securities) at the time it sets the daily NAV that values the shares it issues and redeems, the shares that Defendants issue to and redeem from market timers do not reflect current market prices of the foreign securities held by the fund.

* * * * *

37. Plaintiff brings this complaint as a class action against Defendants Columbia Trust and Columbia Fund Manager, and pursuant to § 5/2-801 et seq., of the Illinois Code of Civil Procedure individually and on behalf of a class of all persons in the United States who have held shares of Columbia Acorn for more than fourteen days from the date of purchase to the date of sale (redemption) or exchange ("long term shareholders"). The class period commences five years prior to the fling of this complaint through the date of filing. Excluded from the class are Defendants, any parent, subsidiary, affiliate, or controlled person of Defendants, as well as the officers, directors, agents, servants or employees of Defendants, and the immediate family members of any such person. Also excluded is any judge who may preside over this case.

* * * * *

COUNT I

Plaintiff, Gary Vogeler, individually and on behalf of all others similarly situated, by and through his undersigned counsel, and for Count I of his Complaint against Defen-

dants Columbia Trust and Columbia Fund Manager, states as follows:

* * * * *

49. Defendants breached their duties of due care owed to Plaintiff Gary Vogeler and similarly situated shareholders of the Columbia Acorn by, inter alia:

a. failing to properly evaluate on a daily basis whether a significant event affecting the value of Columbia Acorn's portfolio of securities had occurred after the foreign trading markets for such securities had closed but before Defendants calculated NAV and share price;

b. failing to implement Columbia Acorn's portfolio valuation and share pricing policies and procedures; and

c. allowing portfolio valuation and share pricing policies and procedures which benefited market timing traders of Columbia Acorn's shares at the expense of long term shareholders.

* * * * *

COUNT II

Plaintiff Gary Vogeler, individually and on behalf of all others similarly situated, by and through his undersigned counsel, and for Count II of his Complaint against Defendants Columbia Trust and Columbia Fund Manager, states as follows:

* * * * *

53. Defendants knew, or were negligent in not knowing, that the closing prices for the foreign securities held by the Columbia Acorn and used by Defendants to calculate NAV for said Fund did not represent current market value because, inter alia, those prices did not reflect changes in the fund's securities which occurred after the exchange on which those foreign securities trade closed

and before the daily calculation of the fund NAV and the setting of share price.

54. With utter indifference and conscious disregard for Plaintiff's investment and the investments of similarly situated fund shareholders, Defendants willfully and wantonly breached their duties to Plaintiff and similarly situated shareholders by, inter alia:

a. failing to know and implement applicable rules and regulations concerning the calculation of NAV;

b. failing to properly evaluate on a daily basis whether a significant event affecting the value of Columbia Acorn's portfolio of securities had occurred after the foreign trading markets for such securities had closed but before Defendants calculated NAV and share price;

c. failing to implement Columbia Acorn's portfolio valuation and share pricing policies and procedures; and

d. allowing portfolio valuation and share pricing policies and procedures which benefited market timing traders of Columbia Acorn's shares at the expense of long term shareholders.

* * * * *

IN THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

Cause No. 03-L-2036

AVERY JACKSON, INDIVIDUALLY AND
ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Plaintiffs,

v.

VAN KAMPEN SERIES FUND, INC. AND
VAN KAMPEN INVESTMENT ADVISORY CORP.,
Defendants.

[Filed Dec. 18, 2003]

COMPLAINT

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13. Studies of world financial markets have established associations between the value changes among various markets. There is a positive correlation between value movements in the United States market and value movements in foreign markets. If the United States market experiences an upward movement in values, it can be predicted that Asian markets will move upward once trading begins their next day. The same upward movement can be predicted for European markets once trading begins their next day. Similarly, if the United States market experiences a downward movement in values, it can be predicted that Asian and European markets will move downward once trading begins their next day. Because of these positive correlations, the closing prices of the foreign securities in the underlying portfolio may not reflect current market values at the time Defendants set their fund NAV. Appropriate adjustments need to be made to the closing

prices of the foreign securities in order to reflect current market values. Despite knowledge of the United States market result, continuous trading of the world equity indexes, ADRs, foreign currency futures markets and the correlations between the value of the fund's securities and these benchmarks, Defendants do not make any value adjustment to the portfolio's foreign securities prior to calculating fund NAV and setting share price every business day.

* * * * *

28. A significant portion of the underlying foreign securities in the Defendants' fund portfolio are listed on foreign exchanges and trade during each market's respective session. The NAVs set by Defendants do not take into account on a daily basis any price relevant information that has become available in this two to fourteen and one/half hour interval, after the final prices for the underlying foreign securities have been posted but, prior to the setting of the NAVs. Price relevant information, such as the continuous trading of world equity market indexes, ADRs, and foreign currency futures impacts the valuation of these underlying foreign securities and is significant for valuation because the final market prices have become stale and do not reflect the current market value of the securities.

29. By failing to make daily adjustments based upon positive correlations between upward or downward movements in United States and foreign markets and by choosing to use stale prices in valuing their fund shares and setting their daily NAVs, Defendants have exposed long term shareholders to market timing traders who regularly purchase and redeem Defendants' shares as part of a profitable trading strategy. The market timing trading strategy stems from the ability of market timing traders to predict changes in the NAV. Market timing traders are able to predict changes in the NAV because of the positive correlations between value movements in United States markets and foreign markets. The stale price strategy of market

timers who trade Defendants' fund shares is to buy shares on days when the United States market moves up and to sell (redeem) shares when the United States market moves down. In order to derive maximum benefit from price relevant information developed subsequent to the now stale closing prices of the portfolio securities, market timers wait until the fund deadline for buying or selling (redeeming) shares in Defendants' funds on any particular business day. Because Defendants cannot buy or sell the foreign securities in the fund's underlying portfolio (due to the time difference between New York and the home markets of the foreign securities) at the time it sets the daily NAV that values the shares it issues and redeems, the shares that Defendants issue to and redeem from market timers do not reflect current market prices of the foreign securities held by the fund.

* * * * *

37. Plaintiff bring [*sic*] this complaint as a class action against Defendants Van Kampen Series Fund, Inc. and Van Kampen Investment Advisory Corp., and pursuant to § 5/2-801 et seq., of the Illinois Code of Civil Procedure individually and on behalf of a class of all persons in the United States who have held shares of Van Kampen International for more than fourteen days. The class period commences five years prior to the filing of this complaint through the date of filing. Excluded from the class are Defendants, any parent, subsidiary, affiliate, or controlled person of Defendants, as well as the officers, directors, agents, servants or employees of Defendants, and the immediate family members of any such person. Also excluded is any judge who may preside over this case.

* * * * *

Count I

Plaintiff, Avery Jackson, individually and on behalf of all others similarly situated, by and through his undersigned counsel, and for Count I of his Complaint against

Defendants Van Kampen Funds and Van Kampen Advisor, states as follows:

* * * * *

49. Defendants breached their duties of due care owed to Plaintiff Avery Jackson and similarly situated shareholders of the Van Kampen International by, inter alia:

i. failing to properly evaluate on a daily basis price relevant information available after the close of the exchange on which Van Kampen International's portfolio of securities trade, but before the setting of the NAV, which was likely to change the value of the securities and the setting of their NAV;

ii. failing to properly adjust the value of Van Kampen International's portfolio securities and the setting of their NAV's when price relevant information available after the close of the exchange on which the portfolio's securities trade, but before the setting of the NAV, indicated a change in the value of the securities; and

iii. allowing portfolio valuation and share pricing policies and procedures which benefitted market timing traders of Van Kampen International's shares at the expense of long term shareholders.

* * * * *

Count II

Plaintiff, Avery Jackson, individually and on behalf of all others similarly situated, by and through his undersigned counsel, and for Count II of his Complaint against Defendants Van Kampen Funds and Van Kampen Advisor, states as follows.

* * * * *

52. Defendants knew, or were negligent in not knowing, that the closing prices for the foreign securities held by Van Kampen International and used by Defendants to calculate NAV for said Fund did not represent current

market value because, inter alia, those prices did not reflect changes in the fund's securities which occurred after the exchange on which those foreign securities trade closed and before defendants calculated NAV and share price.

53. With utter indifference or conscious disregard for Plaintiff Avery Jackson's investment and the investments of similarly situated fund shareholders, Defendants breached their duties to Plaintiff Avery Jackson and similarly situated shareholders by, inter alia:

i. failing to properly evaluate on a daily basis price relevant information available after the close of the exchange on which Van Kampen International's portfolio of securities trade, but before the setting of the NAV, which was likely to change the value of the securities and the setting of their NAV;

ii. failing to properly adjust the value of Van Kampen International's portfolio of securities and the setting of their NAV when price relevant information available after the close of the exchange on which the portfolio's securities trade, but before the setting of the NAV, indicated a change in the value of the securities;

iii. failing to implement Van Kampen International's portfolio valuation and share pricing policies and procedures; and

iv. allowing portfolio valuation and share pricing policies and procedures which benefitted market timing traders of Van Kampen International's shares at the expense of long term shareholders.

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IN THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

Cause No. 04-L-241

TERRY SPURGEON, AS CUSTODIAN FOR THE BENEFIT OF JAMES E. SPURGEON, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Plaintiff,

v.

PACIFIC LIFE INSURANCE COMPANY,
Defendant.

[Filed Mar. 12, 2004]

COMPLAINT

Plaintiff Terry Spurgeon, as custodian for the benefit of James E. Spurgeon and on behalf of others similarly situated, states as follows for his Complaint against Pacific Life Insurance Company ("Pacific Life"):

THE PARTIES, JURISDICTION AND VENUE

1. Plaintiff Terry Spurgeon is a resident of Moro, Illinois, in Madison County.

2. At all times relevant to this Complaint, Plaintiff owned a Pacific Life Individual Flexible Premium Deferred Variable Annuity which he purchased for the benefit of his then-minor son, James E. Spurgeon pursuant to the Uniform Gifts to Minors Act.

3. Pacific Life is a California corporation with its principal place of business in Newport Beach, California.

4. Pacific Life is licensed to sell insurance products in Illinois, and at all times relevant to this Complaint, Pacific Life has promoted, marketed, and sold insurance and variable annuities to the investing public nationwide, including in Madison County, Illinois.

5. Pacific Life maintains investor relationships with clients in Madison County, Illinois, communicates regularly with them by mail and maintains an interactive website to communicate with clients, including clients in Madison County.

6. The transactions which are the subject of this Complaint occurred in part in Madison County, Illinois.

7. This Court therefore has jurisdiction over Pacific Life pursuant to 735 ILCS § 5/2-209, and venue is proper in this County pursuant to 735 ILCS § 5/2-101.

PACIFIC LIFE'S VARIABLE ANNUITY FUNDS

8. Issuers of variable annuities like Pacific Life have marketed the advantages of long-term investment through variable annuities (such as professional management, diversification, insurance protection and tax deferral) over direct investment in securities.

9. A Pacific Life annuity, such as the Pacific Life Individual Flexible Premium Deferred Variable Annuity, is a contract between an investor and Pacific Life, in which the investor agrees to make at least one minimum premium payment to Pacific Life in return for a series of annuity payments at a later date.

10. The Pacific Life annuities which are the subject of this Complaint are those which consist of a "separate account" which keeps investors' assets separate from Pacific Life's assets, and each annuity's separate account is further divided into multiple sub-accounts. Each sub-account corresponds to a single mutual fund, and Pacific Life invests the assets of each sub-account in that sub-account's corresponding mutual fund. These mutual funds are

maintained exclusively for variable annuity or variable life insurance products, although they often bear names very similar to those of retail mutual funds.

11. An investor may allocate his premium payment and accumulated proceeds in the variable annuity among one or more of the various sub-accounts.

12. Different Pacific Life annuities permit investment in some of the same sub-accounts, meaning that owners of different annuities may nevertheless be invested in the same sub-accounts.

13. When an investor allocates any portion of a premium payment or accumulated proceeds to a sub-account, Pacific Life credits that sub-account with sub-account "units."

14. Units in Pacific Life's sub-accounts can be traded, either by purchase or redemption, only once a day at 4:00 p.m. Eastern Time.

15. Sub-account units are sold at a price based upon the sub-account "unit value" (UV) plus applicable sales charges. Units of the sub-accounts may be redeemed at the UV less any redemption or surrender charges. The UV is the value of a single accumulation unit in a sub-account.

16. The number of accumulation units an investor receives is determined when he allocates some or all of a premium payment or accumulated proceeds to a sub-account. The number of units is determined by dividing the amount of the premium payment or accumulated proceeds allocated to the sub-account by the UV of one unit of that sub-account.

17. The initial UV of each sub-account was $10 on the trading day the sub-account began operations.

18. Pacific Life establishes a new daily UV for each sub-account once every trading day at the close of trading on the New York Stock Exchange at 4:00 p.m. Eastern Time.

19. Pacific Life establishes the daily UV for each sub-account by multiplying each sub-account's UV for the prior trading day by a "net investment factor."

20. The "net investment factor" equals the quotient obtained by dividing the per share value of the assets of that sub-account (A) as of the end of that valuation period by the net asset value per share of the corresponding mutual fund as of the end of the preceding valuation period (B), minus certain daily charges, fees and deductions (C) (*i.e.*, net investment factor = (A / B) - C). A valuation period is the period between a trading day and the immediately preceding trading day.

21. Because a sub-account's UV is based upon the per share value of the underlying mutual fund, the value of an investor's sub-account units is subject to change much the same way that the value of a mutual fund share changes each day. The value of an investor's sub-account units will fluctuate as the value of the corresponding mutual fund fluctuates.

22. The mutual funds in which Pacific Life invests sub-account assets are managed by fund managers with which Pacific Life contracts.

23. The fund managers handle the day-to-day tasks associated with managing an investment portfolio, such as investment management and valuation of the mutual fund's underlying portfolio of securities.

24. At the end of each trading day, the assets of the mutual fund are valuated, and a "net asset value" is established for the mutual fund. That net asset value is the same net asset value Pacific Life uses to establish the corresponding sub-account's daily UV.

PACIFIC LIFE'S SUB-ACCOUNTS' UNDERLYTNG PORTFOLIOS INCLUDE FOREIGN MUTUAL FUNDS

25. Some of the mutual funds in which the annuity sub-accounts are invested include in their portfolios securities which are traded in markets outside of the United States.

26. In valuing the assets of a mutual fund, the fund manager uses the last trade price in the home market of each of the securities in its portfolio. The home markets for such foreign securities include London, Paris, Frankfurt, Moscow, Singapore, Kuala Lumpur, Hong Kong, Taipei. Tokyo and Sydney. These markets are located in time zones that are five to fifteen hours ahead of Eastern Time.

27. Thus, a five to fifteen hour interval elapses between the close of the foreign securities markets and Pacific Life's calculation of its sub-account's UVs.

28. For example, the exchange located in Tokyo, Japan observes normal trading hours of 9:00 a.m. to 3:00 p.m. local time. Active trading of securities traded on this exchange ends, and closing prices for those securities are posted, at 3:00 p.m. local time (2:00 a.m. Eastern time). When the mutual fund calculates the value of its portfolio securities using closing prices from this exchange and Pacific Life sets its sub-account UV based upon those values, Pacific Life relies upon closing prices for securities traded on this exchange that have been static for 14 hours.

29. Studies of world financial markets have established associations between the value changes among various markets. There is a positive correlation between value movements in the U.S. markets and value movements in foreign markets. If the U.S. markets experience an upward movement in values, it can be predicted that Asian markets will move upward once trading begins the next day. The same upward movement can be predicted for European markets once trading begins the next day. Similarly, if the U.S. markets experience a downward move-

ment in values, it can be predicted that Asian and European markets will move downward once trading begins the next day.

30. Studies also demonstrate that the greater the percentage increase or decrease in the value of U.S. markets, the more likely foreign markets will post corresponding value movements on the subsequent trading day. The probability that the value movements of foreign markets will follow the previous day's value movements in U.S. markets is directly correlated to the degree or extent of the value movement of U.S. markets.

PACIFIC LIFE EXPOSES INVESTORS TO MARKET TIMING TRADING

31. A significant portion of the underlying securities in the mutual fund portfolios associated with the Pacific Life sub-accounts are listed on foreign exchanges and trade during each market's respective session. The share values set by these mutual funds and used by Pacific Life in setting its UV do not take into account on a daily basis any price relevant information (such as value movements in the U.S. markets, changes in world equity market indices, changes in the value of American Depository Receipts (ADRs), and fluctuations in foreign currency futures markets) that has become available in the interval between the close of the foreign markets and the calculation of the UV. Such price relevant information impacts the valuation of the underlying securities in the mutual funds in which sub-account proceeds are invested and the subsequent calculation of the sub-accounts' UVs. Such price relevant information is significant because the final market prices of the foreign securities often have become stale and no longer accurately reflect the true current market value of the securities.

32. By failing to make daily adjustments based upon the direction and degree of correlations between movements in U.S. and foreign markets, changes in world equity market indices, changes in the value of ADRs, and

fluctuations in foreign currency futures markets, and by calculating sub-account UVs based upon the corresponding mutual funds' net asset values which, in turn, are based upon the stale prices of foreign securities in the mutual funds' portfolios, Pacific Life has exposed long-term annuity owners to market timing traders who regularly purchase and redeem units of Pacific Life's sub-accounts as part of a profitable, stale-price trading strategy.

33. Market timing trading strategy is a short-term trading strategy which takes advantage of the stale pricing of the foreign securities upon which the sub-accounts' UVs are based, enabling such traders to predict changes in the UVs as a result of price relevant events that occur after the close of foreign securities markets and before Pacific Life calculates the sub-accounts' daily UVs. Market timing traders are able to predict changes in sub-account UVs because of the positive directional and degree of correlations between movements in U.S. and foreign markets, changes in world equity market indices, changes in the value of ADRs, and fluctuations in foreign currency futures markets.

34. The stale price strategy of market timers who trade in units of Pacific Life's sub-accounts is to buy units on days when the U.S. markets move up and to redeem units when the U.S. markets move down. In order to derive maximum benefit from price relevant information developed subsequent to the now stale closing prices of the portfolio securities, market timers wait until the variable annuity's deadline for buying or redeeming units in Pacific Life's sub-accounts on any particular business day. Because Pacific Life cannot make an investment in the underlying mutual fund and the mutual fund cannot buy or sell the foreign securities in its underlying portfolio (due to the time difference between New York and the home markets of the foreign securities) at the time Pacific Life sets the daily UV, the units that Pacific Life issues to and redeems from market timers do not reflect the actual value

of the foreign securities held in the portfolio of the corresponding mutual fund.

35. Due to Pacific Life's use of mutual fund net asset values which are based upon stale prices of foreign securities, market timers who buy Pacific Life's sub-account units on days when the U.S. markets move up are buying discounted units and thereby dilute the ownership interests of other sub-account holders because the sub-accounts' underlying foreign securities assets are undervalued as of the time of the unit purchase.

36. Due to Pacific Life's use of mutual fund net asset values which are based upon stale prices of foreign securities, market timers who redeem Pacific Life's units on days when the U.S. markets move down are redeeming units at a premium and thereby dilute the ownership interests of other sub-account holders because the underlying foreign securities assets are overvalued as of the time of the unit redemption.

37. The excess profits that market timing traders obtain take advantage of the stale pricing of Pacific Life's sub-accounts and dilute the ownership interests of other sub-account holders. When market timing traders buy units at stale, discounted prices, the ownership interests of other sub-account holders are diluted because the market timer has unfairly become, per unit, an equal sub-account owner with existing owners per unit. When market timing traders later redeem those units at a premium, the prior dilution of other sub-account holders' ownership interests is made permanent and, if the UV is then artificially inflated as a result of Pacific Life's UV calculation practices, may further dilute other sub-account holders' ownership interests. Long-term sub-account holders suffer a dilution in their ownership interests and the wealth represented by that diluted amount is transferred from them to market timing traders. Thus, the market timing trades capture an arbitrage profit that comes dollar-for-dollar out of the pockets of the investors.

CLASS ACTION ALLEGATIONS

38. Through his ownership of the Pacific Life Individual Flexible Premium Deferred Variable Annuity, Plaintiff at all times relevant to this Complaint held units in the Lazard International Value Fund sub-account for the purpose of long-term investment.

39. Plaintiff brings this class action on behalf of himself and on behalf of a class of all persons in the United States who, through their ownership of an Pacific Life annuity or insurance products, held units of any Pacific Life sub-account invested in mutual funds which included foreign securities in their portfolios and which experienced market timing trading activity. Excluded from the Class are Pacific Life and any of its parent, subsidiary or affiliated corporations, as well as any of their controlled persons, officers, directors, agents, servants or employees, and the immediate family members of any such person; any judge who may preside over this case; all persons who have claims in excess of $75,000; and any investor who engaged in market timing trading in the Pacific Life sub-accounts which are the subject of this Complaint.

40. Excluded from this Complaint are any claims based upon Pacific Life's conduct in connection with Plaintiff's or any class member's purchase or sale of any Pacific Life annuity product or units in any Pacific Life sub-account.

41. Plaintiff is a member of the Class and will fairly and adequately assert and protect the interests of the Class. Plaintiff's interests are coincident with, and not antagonistic to, those of other class members.

42. Plaintiff has retained attorneys who are experienced in class action litigation.

43. Members of the Class are so numerous and geographically dispersed that joinder of all members is impracticable. While Plaintiff cannot ascertain the exact number and identity of class members prior to discovery, on information and belief, there are thousands of class

members and their identity can be ascertained from Pacific Life's books and records.

44. There are questions of law or fact common to the Class.

45. Those common questions predominate over any questions affecting only individual members of the Class. Common questions include, but are not limited to, the following:

a. whether Pacific Life negligently failed to evaluate on a daily basis price relevant information available after the close of the exchanges in which the securities held by the mutual funds' portfolios trade, but before the setting of the daily UV, which was likely to change the value of the mutual fund securities and thus sub-account UVs;

b. whether Pacific Life negligently failed to implement valuation and pricing policies and procedures which account for price relevant events occurring after the close of the exchanges in which the securities held by the mutual funds' portfolios trade, but before the setting of the daily UV, when calculating the UV when closing prices of mutual fund portfolio securities did not reflect their true market values;

c. whether Pacific Life negligently failed to protect its sub-account holders from market timing trading;

d. whether Pacific Life breached its fiduciary obligations to Plaintiff and the Class by failing to evaluate on a daily basis price relevant information available after the close of the exchanges in which the securities held by the mutual funds' portfolios trade, but before the setting of the daily UV, which was likely to change the value of the mutual fund securities and thus sub-account UVs;

e. whether Pacific Life breached its fiduciary obligations to Plaintiff and the Class by failing to imple-

ment valuation and pricing policies and procedures which account for price relevant events occurring after the close of the exchanges in which the securities held by the mutual funds' portfolios trade, but before the setting of the daily UV, when calculating the UV whenever closing prices of mutual fund portfolio securities did not reflect their true market values;

f. whether Pacific Life breached its fiduciary obligations to Plaintiff and the Class by failing to implement valuation and pricing policies that use price relevant information to value mutual fund portfolio securities and sub-account UVs whenever closing prices of the securities held by the mutual funds' portfolios did not reflect their true market values;

g. whether Pacific Life breached its fiduciary obligations to Plaintiff and the Class by failing to protect Pacific Life sub-account holders from market timing trading;

h. whether Plaintiff and the Class have sustained damages as a result of Pacific Life's conduct; and/or

i. the proper measure of any such damages.

46. The prosecution of separate actions by individual members of the Class would create a risk of:

a. inconsistent or varying adjudications with respect to individual members of the Class; and/or

b. adjudication with the respect to individual members of the class, which would, as a practical matter, be dispositive of the interests of other members not parties to the adjudication or substantially impair or impede their ability to protest their interest.

47. The class action method is appropriate for the fair and efficient prosecution of this action.

48. Individual litigation of all claims, which might be brought by all class members, would produce a multiplicity

of cases so that the judicial system would be congested for years. Class treatment, by contrast, provides manageable judicial treatment calculated to bring a rapid conclusion to all litigation of all claims arising from the conduct of Pacific Life.

COUNT I

49. Plaintiff repeats and incorporates by reference paragraphs 1 through 48 as if fully set forth herein.

50. Pacific Life directly or impliedly held itself out as a skilled specialist in the field of investment management, possessing the specialized knowledge, skill and care ordinarily used by reasonably well-qualified members of the investment management profession.

51. It thereby became Pacific Life's duty to exercise that degree of knowledge, skill and care ordinarily used, or which should be used, by reasonably well-qualified members of the investment management profession, including but not limited to the duties:

a. to use mutual fund share values predicated upon accurate market values when valuing sub-accounts and setting their daily UV's; and/or

b. to prevent market timing trading in sub-accounts to prevent the dilution of the ownership interests of long-term investors.

52. Pacific Life knew or should have known that the closing prices for the foreign securities held in its sub-accounts' corresponding mutual funds' portfolios did not represent accurate market values of those foreign securities whenever price relevant events had occurred after the closing of foreign securities markets but before Pacific Life's calculation of daily UVs.

53. Pacific Life was negligent in one or more of the following ways:

a. failing to evaluate on a daily basis price relevant information available to Pacific Life after the close

of foreign securities markets in which the underlying mutual funds' portfolios of securities traded;

b. failing to adjust calculation of the daily UV to take into account any changes in value of the foreign securities held in the underlying mutual funds' portfolios whenever price relevant events occurred after the closing of the foreign securities markets but before Pacific Life's calculation of daily UVs;

c. failing to implement Pacific Life's valuation and unit pricing policies and procedures;

d. using valuation and unit pricing policies and procedures which benefited market timing traders of Pacific Life's sub-accounts at the expense of long-term sub-account holders; and/or

e. by favoring certain investors and permitting them to engage in market timing trading at the expense of other investors, namely Plaintiff and the Class.

54. As a direct and proximate result of Pacific Life's negligence, Plaintiff and the Class have suffered damages in the amount to be proven at trial, but less than $75,000 per Plaintiff or Class member, including all compensatory damages and costs.

WHEREFORE, Plaintiff and the Class pray that the Court enter judgment in their favor and against PACIFIC LIFE INSURANCE COMPANY; ordering that this action be maintained as a class action pursuant to 735 ILCS § 5/2-801 and certifying an appropriate class; and awarding Plaintiff and the Class compensatory damages, attorney's fees, prejudgment interest, and costs of suit in an amount not to exceed $75,000 per plaintiff or class member. Plaintiff demands a trial by jury on all issues so triable.

COUNT II

55. Plaintiff repeats and incorporates by reference paragraphs 1 through 48 and 50 through 51 as if fully set forth herein.

56. Pacific Life knew or was recklessly indifferent to the fact that the closing prices for the foreign securities held in its sub-accounts' corresponding mutual funds' portfolios did not represent accurate market values of those foreign securities whenever price relevant events had occurred after the closing of foreign securities markets and before Pacific Life's calculation of the daily UVs.

57. Pacific Life knowingly or with utter indifference to and conscious disregard for the rights of Plaintiff and the Class willfully and wantonly engaged in one or more of the following acts or omissions:

a. failing to evaluate on a daily basis price relevant information available to Pacific Life after the close of foreign securities markets in which the underlying mutual funds' portfolios of securities traded;

b. failing to adjust calculation of the daily UV to take into account any changes in value of the foreign securities held in the underlying mutual funds' portfolios whenever price relevant events occurred after the closing of the foreign securities markets but before Pacific Life's calculation of daily UVs;

c. failing to implement Pacific Life's valuation and unit pricing policies and procedures;

d. using valuation and unit pricing policies and procedures which benefited market timing traders of Pacific Life's sub-accounts at the expense of long-term sub-account holders; and/or

e. by favoring certain investors and permitting them to engage in market timing trading at the expense of other investors, namely Plaintiff and the Class.

58. As a direct and proximate result of Pacific Life's foregoing conduct, Plaintiff and the Class have suffered damages in the amount to be proven at trial, but less than $75,000 per Plaintiff or Class member, including all compensatory damages and costs.

WHEREFORE, Plaintiff and the Class pray that the Court enter judgment in their favor and against PACIFIC LIFE INSURANCE COMPANY; ordering that this action be maintained as a class action pursuant to 735 ILCS § 5/2-801 and certifying an appropriate class; and awarding Plaintiff and the Class compensatory and punitive damages, attorney's fees, prejudgment interest, and costs of suit in an amount not to exceed $75,000 per plaintiff or class member. Plaintiff demands a trial by jury on all triable issues.

COUNT III

59. Plaintiff repeats and incorporates by reference paragraphs 1 through 48 and 50 through 51 as if fully set forth herein.

60. A special relationship existed between Pacific Life and Plaintiff and the Class as a result of the following:

a. Pacific Life is a stock corporation. The shareholders select the board of directors who will manage Pacific Life's assets, and the directors act as fiduciaries in managing Plaintiff's and Class' funds;

b. Pacific Life assumed a position of trust and confidence by servicing and managing Plaintiff's and class members' investments in Pacific Life annuities;

c. The calculation of the UV was within the exclusive control of Pacific Life;

d. Whether market timing was allowed to occur in the sub-accounts was within the exclusive control of Pacific Life;

e. Because Pacific Life's variable annuities were contracts of adhesion prepared by Pacific Life and not subject to negotiation, unequal bargaining power existed between Plaintiff and class members and Pacific Life;

f. Pacific Life and its agents held themselves out as highly-skilled insurance and financial experts, possessing the special knowledge and expertise needed to interpret and understand the complex and sophisticated daily management of annuity investments; and/or

g. Pacific Life is an insurer characterized by elements of public interest which subject it to more stringent standards of conduct than those normally arising out of contract.

61. As a result of the foregoing, Pacific Life was a fiduciary to Plaintiff and Class members, and Pacific Life owed Plaintiff and the Class certain fiduciary duties.

62. Pacific Life breached its fiduciary duties to Plaintiff and the Class in one or more of the following ways:

a. exposing Plaintiff's and the Class' ownership interests in the sub-accounts to dilution through market timing trading by failing to evaluate on a daily basis price relevant information available to Pacific Life after the close of foreign securities markets in which the underlying mutual funds' portfolios of securities traded;

b. exposing Plaintiff's and the Class' ownership interests in the sub-accounts to dilution through market timing trading by failing to adjust calculation of the daily UV to take into account any changes in value of the foreign securities held in the underlying mutual funds' portfolios whenever price relevant events occurred after the closing of the foreign securities markets but before Pacific Life's calculation of daily UVs;

c. exposing Plaintiff's and the Class' ownership interests in the sub-accounts to dilution through market timing trading by failing to implement Pacific Life's valuation and unit pricing policies and procedures;

d. exposing Plaintiff's and the Class' ownership interests in the sub-accounts to dilution through market timing trading by using valuation and unit pricing policies and procedures which benefited market timing traders of Pacific Life's sub-accounts at the expense of long-term sub-account holders;

e. by failing to provide complete and truthful information to Plaintiff and the Class regarding Pacific Life's allowance of market timing activities in Pacific Life sub-accounts;

f. by failing to provide complete and truthful information to Plaintiff and the Class regarding the dilution of their holdings due to Pacific Life's failure to use accurate market values of foreign securities held in the underlying mutual funds' portfolios when setting daily UV's; and/or

g. by favoring certain investors and permitting them to engage in market timing trading at the expense of other investors, namely Plaintiff and the Class.

63. As a direct and proximate result of Pacific Life's breaches of fiduciary duties, Plaintiff and the Class have suffered damages in the amount to be proven at trial, but less than $75,000 per plaintiff or class member, including all compensatory damages and costs.

WHEREFORE, Plaintiff and the Class pray that the Court enter judgment in their favor and against PACIFIC LIFE INSURANCE COMPANY; ordering that this action be maintained as a class action pursuant to 735 ILCS § 5/2-801 and certifying an appropriate class; and awarding Plaintiff and the Class compensatory and punitive damages, attorney's fees, prejudgment interest, and costs of suit in an amount not to exceed $75,000 per plaintiff or class member. Plaintiff demands a trial by jury on all issues so triable.

COUNT IV

64. Plaintiff repeats and incorporates by reference paragraphs 1 through 63 as if fully set forth herein.

65. Pacific Life's valuation and unit pricing policies and practices which are the subject of this Complaint were conceived and emanated from California.

66. Because Pacific Life is a California corporation with its principal place of business in California and because Pacific Life's valuation and unit pricing policies and practices which are the subject of this Complaint were conceived in and emanated from California, Pacific Life is subject to the provisions of Cal. Bus. & Prof. Code § 17200 *et seq.*

67. California Bus. & Prof. Code § 17200 prohibits any "unlawful . . . business act or practice." Pacific Life has violated Cal. Bus. & Prof. Code § 17200's prohibition against engaging in an unlawful act or practice by violating the common law as alleged in Counts I through III of this Complaint.

68. Plaintiff reserves the right to allege other violations of law, which constitute other unlawful business acts or practices. Such conduct is ongoing and continues to this date.

69. California Bus. & Prof. Code § 17200 also prohibits any "unfair . . . business act or practice." As detailed in the preceding paragraphs, Pacific Life engaged in conduct that is unfair within the meaning of Cal. Bus. & Prof. Code § 17200 *et seq.* Pacific Life's practices offend public policy and are unethical, oppressive, unscrupulous and violate the laws identified herein and the policies supporting those laws.

70. Pacific Life's conduct caused and continues to cause substantial injury to Plaintiff and Class members.

71. The justifications, if any, for Pacific Life's wrongful conduct were and are vastly outweighed by the adverse effects of such conduct.

72. Finally, there were reasonably available alternatives to Pacific Life to further its business interests, other than the acts and omissions described in this Complaint. As a result, Pacific Life engaged in unfair business practices prohibited by Cal. Bus. & Prof. Code § 17200 *et seq.*

73. California Bus. & Prof. Code § 17200 also prohibits any "fraudulent business act or practice." Pacific Life's acts and omissions, as more fully set forth elsewhere in this Complaint, were fraudulent within the meaning of Cal. Bus. & Prof. Code § 17200, and were likely to deceive the public, Plaintiff and Class members. Pacific Life's fraudulent conduct constitutes a fraudulent business act or practice within the meaning of Cal. Bus. & Prof. Code § 17200 *et seq.*

74. Pacific Life engaged in these unlawful, unfair and fraudulent business acts and practices with others who participated, in whole and in part, in the conduct alleged.

75. As a result of the foregoing conduct, Pacific Life and any co-participants have been unjustly enriched at the expense of plaintiff and Class members.

76. As a co-participant in the violation of Cal. Bus. & Prof. Code § 17200 *et seq.*, Pacific Life is jointly and severally liable for the restoration to any person of any and all money that has been acquired by means of the alleged violations of Cal. Bus. & Prof. Code § 17200 *et seq.*

77. The unlawful, unfair, and fraudulent business practices of Defendant described above present a continuing threat to members of the public in that Defendant continues to engage in the conduct described herein.

WHEREFORE, Plaintiff and the Class pray that the Court order that this action be maintained as a class action pursuant to 735 ILCS § 5/2-801 and certify an appro-

priate class; grant restitution to Plaintiff and the Class by ordering Defendant PACIFIC LIFE INSURANCE COMPANY to return to Plaintiff and the Class all sums unlawfully and unfairly obtained from them as the result of Pacific Life's unfair and unlawful business practices in an amount not to exceed $75,000 per plaintiff or class member; and order Defendant PACIFIC LIFE INSURANCE COMPANY to pay to Plaintiffs and the Class all costs of suit, attorneys' fees, prejudgment interest and any other relief the Court deems appropriate under the circumstances in accordance with section 17200 of the California Business and Professions Code.

[attorney name and address blocks omitted]

STATUTORY AND REGULATORY PROVISIONS INVOLVED

15 U.S.C. § 77p provides:

§ 77p. Additional remedies; limitation on remedies

(a) Remedies additional

Except as provided in subsection (b) of this section, the rights and remedies provided by this subchapter shall be in addition to any and all other rights and remedies that may exist at law or in equity.

(b) Class action limitations

No covered class action based upon the statutory or common law of any State or subdivision thereof may be maintained in any State or Federal court by any private party alleging –

(1) an untrue statement or omission of a material fact in connection with the purchase or sale of a covered security; or

(2) that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security.

(c) Removal of covered class actions

Any covered class action brought in any State court involving a covered security, as set forth in subsection (b) of this section, shall be removable to the Federal district court for the district in which the action is pending, and shall be subject to subsection (b) of this section.

(d) Preservation of certain actions

(1) Actions under State law of State of incorporation

(A) Actions preserved

Notwithstanding subsection (b) or (c) of this section, a covered class action described in subparagraph (B) of this paragraph that is based upon the statutory or common law of the State in which the issuer is incorporated (in the case of a corporation) or organized (in the case of any other entity) may be maintained in a State or Federal court by a private party.

(B) Permissible actions

A covered class action is described in this subparagraph if it involves –

(i) the purchase or sale of securities by the issuer or an affiliate of the issuer exclusively from or to holders of equity securities of the issuer; or

(ii) any recommendation, position, or other communication with respect to the sale of securities of the issuer that –

(I) is made by or on behalf of the issuer or an affiliate of the issuer to holders of equity securities of the issuer; and

(II) concerns decisions of those equity holders with respect to voting their securities, acting in response to a tender or exchange offer, or exercising dissenters' or appraisal rights.

(2) State actions

(A) In general

Notwithstanding any other provision of this section, nothing in this section may be construed to preclude a State or political subdivision thereof or a State pension plan from bringing an action involving

a covered security on its own behalf, or as a member of a class comprised solely of other States, political subdivisions, or State pension plans that are named plaintiffs, and that have authorized participation, in such action.

(B) "State pension plan" defined

For purposes of this paragraph, the term "State pension plan" means a pension plan established and maintained for its employees by the government of the State or political subdivision thereof, or by any agency or instrumentality thereof.

(3) Actions under contractual agreements between issuers and indenture trustees

Notwithstanding subsection (b) or (c) of this section, a covered class action that seeks to enforce a contractual agreement between an issuer and an indenture trustee may be maintained in a State or Federal court by a party to the agreement or a successor to such party.

(4) Remand of removed actions

In an action that has been removed from a State court pursuant to subsection (c) of this section, if the Federal court determines that the action may be maintained in State court pursuant to this subsection, the Federal court shall remand such action to such State court.

(e) Preservation of State jurisdiction

The securities commission (or any agency or office performing like functions) of any State shall retain jurisdiction under the laws of such State to investigate and bring enforcement actions.

(f) Definitions

For purposes of this section, the following definitions shall apply:

(1) Affiliate of the issuer

The term "affiliate of the issuer" means a person that directly or indirectly, through one or more intermediaries, controls or is controlled by or is under common control with, the issuer.

(2) Covered class action

(A) In general

The term "covered class action" means –

(i) any single lawsuit in which –

(I) damages are sought on behalf of more than 50 persons or prospective class members, and questions of law or fact common to those persons or members of the prospective class, without reference to issues of individualized reliance on an alleged misstatement or omission, predominate over any questions affecting only individual persons or members; or

(II) one or more named parties seek to recover damages on a representative basis on behalf of themselves and other unnamed parties similarly situated, and questions of law or fact common to those persons or members of the prospective class predominate over any questions affecting only individual persons or members; or

(ii) any group of lawsuits filed in or pending in the same court and involving common questions of law or fact, in which –

(I) damages are sought on behalf of more than 50 persons; and

(II) the lawsuits are joined, consolidated, or otherwise proceed as a single action for any purpose.

(B) Exception for derivative actions

Notwithstanding subparagraph (A), the term "covered class action" does not include an exclusively derivative action brought by one or more shareholders on behalf of a corporation.

(C) Counting of certain class members

For purposes of this paragraph, a corporation, investment company, pension plan, partnership, or other entity, shall be treated as one person or prospective class member, but only if the entity is not established for the purpose of participating in the action.

(D) Rule of construction

Nothing in this paragraph shall be construed to affect the discretion of a State court in determining whether actions filed in such court should be joined, consolidated, or otherwise allowed to proceed as a single action.

(3) Covered security

The term "covered security" means a security that satisfies the standards for a covered security specified in paragraph (1) or (2) of section 77r(b) of this title at the time during which it is alleged that the misrepresentation, omission, or manipulative or deceptive conduct occurred, except that such term shall not include any debt security that is exempt from registration under this subchapter pursuant to rules issued by the Commission under section 77d(2) of this title.

15 U.S.C. § 78j provides:

§ 78j. Manipulative and deceptive devices

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange –

(a)(1) To effect a short sale, or to use or employ any stop-loss order in connection with the purchase or sale, of any security registered on a national securities exchange, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(2) Paragraph (1) of this subsection shall not apply to security futures products.

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, or any securities-based swap agreement (as defined in section 206B of the Gramm-Leach-Bliley Act), any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Rules promulgated under subsection (b) of this section that prohibit fraud, manipulation, or insider trading (but not rules imposing or specifying reporting or recordkeeping requirements, procedures, or standards as prophylactic measures against fraud, manipulation, or insider trading), and judicial precedents decided under subsection (b) of this section and rules promulgated thereunder that prohibit fraud, manipulation, or insider trading, shall apply to security-based swap agreements (as defined in section 206B of the Gramm-Leach-Bliley Act) to the same extent as they apply to securities. Judicial precedents decided under section 77q(a) of this title and sections 78i,

78o, 78p, 78t, and 78u-1 of this title, and judicial precedents decided under applicable rules promulgated under such sections, shall apply to security-based swap agreements (as defined in section 206B of the Gramm-Leach-Bliley Act) to the same extent as they apply to securities.

15 U.S.C. § 78bb provides:

§ 78bb. Effect on existing law

(a) Addition of rights and remedies; recovery of actual damages; State securities commissions

Except as provided in subsection (f) of this section, the rights and remedies provided by this chapter shall be in addition to any and all other rights and remedies that may exist at law or in equity; but no person permitted to maintain a suit for damages under the provisions of this chapter shall recover, through satisfaction of judgment in one or more actions, a total amount in excess of his actual damages on account of the act complained of. Except as otherwise specifically provided in this chapter, nothing in this chapter shall affect the jurisdiction of the securities commission (or any agency or officer performing like functions) of any State over any security or any person insofar as it does not conflict with the provisions of this chapter or the rules and regulations thereunder. No State law which prohibits or regulates the making or promoting of wagering or gaming contracts, or the operation of "bucket shops" or other similar or related activities, shall invalidate any put, call, straddle, option, privilege, or other security subject to this chapter, or apply to any activity which is incidental or related to the offer, purchase, sale, exercise, settlement, or closeout of any such security. No provision of State law regarding the offer, sale, or distribution of securities shall apply to any transaction in a security futures product, except that this sentence shall not be construed as limiting any State antifraud law of general applicability.

(b) Modification of disciplinary procedures

Nothing in this chapter shall be construed to modify existing law with regard to the binding effect (1) on any member of or participant in any self-regulatory organization of any action taken by the authorities of such organization to settle disputes between its members or partici-

pants, (2) on any municipal securities dealer or municipal securities broker of any action taken pursuant to a procedure established by the Municipal Securities Rulemaking Board to settle disputes between municipal securities dealers and municipal securities brokers, or (3) of any action described in paragraph (1) or (2) on any person who has agreed to be bound thereby.

(c) Continuing validity of disciplinary sanctions

The stay, setting aside, or modification pursuant to section 78s(e) of this title of any disciplinary sanction imposed by a self-regulatory organization on a member thereof, person associated with a member, or participant therein, shall not affect the validity or force of any action taken as a result of such sanction by the self-regulatory organization prior to such stay, setting aside, or modification: *Provided*, That such action is not inconsistent with the provisions of this chapter or the rules or regulations thereunder. The rights of any person acting in good faith which arise out of any such action shall not be affected in any way by such stay, setting aside, or modification.

(d) Physical location of facilities of registered clearing agencies or registered transfer agents not to subject changes in beneficial or record ownership of securities to State or local taxes

No State or political subdivision thereof shall impose any tax on any change in beneficial or record ownership of securities effected through the facilities of a registered clearing agency or registered transfer agent or any nominee thereof or custodian therefor or upon the delivery or transfer of securities to or through or receipt from such agency or agent or any nominee thereof or custodian therefor, unless such change in beneficial or record ownership or such transfer or delivery or receipt would otherwise be taxable by such State or political subdivision if the facilities of such registered clearing agency, registered transfer agent, or any nominee thereof or custodian therefor were not physically located in the taxing State or

political subdivision. No State or political subdivision thereof shall impose any tax on securities which are deposited in or retained by a registered clearing agency, registered transfer agent, or any nominee thereof or custodian therefor, unless such securities would otherwise be taxable by such State or political subdivision if the facilities of such registered clearing agency, registered transfer agent, or any nominee thereof or custodian therefor were not physically located in the taxing State or political subdivision.

(e) Exchange, broker, and dealer commissions; brokerage and research services

(1) No person using the mails, or any means or instrumentality of interstate commerce, in the exercise of investment discretion with respect to an account shall be deemed to have acted unlawfully or to have breached a fiduciary duty under State or Federal law unless expressly provided to the contrary by a law enacted by the Congress or any State subsequent to June 4, 1975, solely by reason of his having caused the account to pay a member of an exchange, broker, or dealer an amount of commission for effecting a securities transaction in excess of the amount of commission another member of an exchange, broker, or dealer would have charged for effecting that transaction, if such person determined in good faith that such amount of commission was reasonable in relation to the value of the brokerage and research services provided by such member, broker, or dealer, viewed in terms of either that particular transaction or his overall responsibilities with respect to the accounts as to which he exercises investment discretion. This subsection is exclusive and plenary insofar as conduct is covered by the foregoing, unless otherwise expressly provided by contract: *Provided*, however, That nothing in this subsection shall be construed to impair or limit the power of the Commission under any other provision of this chapter or otherwise.

(2) A person exercising investment discretion with respect to an account shall make such disclosure of his policies and practices with respect to commissions that will be paid for effecting securities transactions, at such times and in such manner, as the appropriate regulatory agency, by rule, may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(3) For purposes of this subsection a person provides brokerage and research services insofar as he –

(A) furnishes advice, either directly or through publications or writings, as to the value of securities, the advisability of investing in, purchasing, or selling securities, and the availability of securities or purchasers or sellers of securities;

(B) furnishes analyses and reports concerning issuers, industries, securities, economic factors and trends, portfolio strategy, and the performance of accounts; or

(C) effects securities transactions and performs functions incidental thereto (such as clearance, settlement, and custody) or required in connection therewith by rules of the Commission or a self-regulatory organization of which such person is a member or person associated with a member or in which such person is a participant.

(4) The provisions of this subsection shall not apply with regard to securities that are security futures products.

(f) Limitations on remedies

(1) Class action limitations

No covered class action based upon the statutory or common law of any State or subdivision thereof may be maintained in any State or Federal court by any private party alleging –

(A) a misrepresentation or omission of a material fact in connection with the purchase or sale of a covered security; or

(B) that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security.

(2) Removal of covered class actions

Any covered class action brought in any State court involving a covered security, as set forth in paragraph (1), shall be removable to the Federal district court for the district in which the action is pending, and shall be subject to paragraph (1).

(3) Preservation of certain actions

(A) Actions under State law of State of incorporation

(i) Actions preserved

Notwithstanding paragraph (1) or (2), a covered class action described in clause (ii) of this subparagraph that is based upon the statutory or common law of the State in which the issuer is incorporated (in the case of a corporation) or organized (in the case of any other entity) may be maintained in a State or Federal court by a private party.

(ii) Permissible actions

A covered class action is described in this clause if it involves –

(I) the purchase or sale of securities by the issuer or an affiliate of the issuer exclusively from or to holders of equity securities of the issuer; or

(II) any recommendation, position, or other communication with respect to the sale of securities of an issuer that –

(aa) is made by or on behalf of the issuer or an affiliate of the issuer to holders of equity securities of the issuer; and

(bb) concerns decisions of such equity holders with respect to voting their securities, acting in response to a tender or exchange offer, or exercising dissenters' or appraisal rights.

(B) State actions

(i) In general

Notwithstanding any other provision of this subsection, nothing in this subsection may be construed to preclude a State or political subdivision thereof or a State pension plan from bringing an action involving a covered security on its own behalf, or as a member of a class comprised solely of other States, political subdivisions, or State pension plans that are named plaintiffs, and that have authorized participation, in such action.

(ii) State pension plan defined

For purposes of this subparagraph, the term "State pension plan" means a pension plan established and maintained for its employees by the government of a State or political subdivision thereof, or by any agency or instrumentality thereof.

(C) Actions under contractual agreements between issuers and indenture trustees

Notwithstanding paragraph (1) or (2), a covered class action that seeks to enforce a contractual agreement between an issuer and an indenture trustee may be maintained in a State or Federal court by a party to the agreement or a successor to such party.

(D) Remand of removed actions

In an action that has been removed from a State court pursuant to paragraph (2), if the Federal court determines that the action may be maintained in State court pursuant to this subsection, the Federal court shall remand such action to such State court.

(4) Preservation of State jurisdiction

The securities commission (or any agency or office performing like functions) of any State shall retain jurisdiction under the laws of such State to investigate and bring enforcement actions.

(5) Definitions

For purposes of this subsection, the following definitions shall apply:

(A) Affiliate of the issuer

The term "affiliate of the issuer" means a person that directly or indirectly, through one or more intermediaries, controls or is controlled by or is under common control with, the issuer.

(B) Covered class action

The term "covered class action" means –

(i) any single lawsuit in which –

(I) damages are sought on behalf of more than 50 persons or prospective class members, and questions of law or fact common to those persons or members of the prospective class, without reference to issues of individualized reliance on an alleged misstatement or omission, predominate over any questions affecting only individual persons or members; or

(II) one or more named parties seek to recover damages on a representative basis on behalf of themselves and other unnamed parties

similarly situated, and questions of law or fact common to those persons or members of the prospective class predominate over any questions affecting only individual persons or members; or

(ii) any group of lawsuits filed in or pending in the same court and involving common questions of law or fact, in which –

(I) damages are sought on behalf of more than 50 persons; and

(II) the lawsuits are joined, consolidated, or otherwise proceed as a single action for any purpose.

(C) Exception for derivative actions

Notwithstanding subparagraph (B), the term "covered class action" does not include an exclusively derivative action brought by one or more shareholders on behalf of a corporation.

(D) Counting of certain class members

For purposes of this paragraph, a corporation, investment company, pension plan, partnership, or other entity, shall be treated as one person or prospective class member, but only if the entity is not established for the purpose of participating in the action.

(E) Covered security

The term "covered security" means a security that satisfies the standards for a covered security specified in paragraph (1) or (2) of section 18(b) of the Securities Act of 1933 [15 U.S.C. 77r(b)], at the time during which it is alleged that the misrepresentation, omission, or manipulative or deceptive conduct occurred, except that such term shall not include any debt security that is exempt from registration under the Securities Act of 1933 [15 U.S.C. 77a et seq.] pursuant to

rules issued by the Commission under section 4(2) of that Act [15 U.S.C. 77d(2)].

(F) Rule of construction

Nothing in this paragraph shall be construed to affect the discretion of a State court in determining whether actions filed in such court should be joined, consolidated, or otherwise allowed to proceed as a single action.

28 U.S.C. § 1291 provides:

§ 1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

28 U.S.C. § 1331 provides:

§ 1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1332 provides:

§ 1332. Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between –

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

For the purposes of this section, section 1335, and section 1441, an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $75,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) For the purposes of this section and section 1441 of this title –

(1) a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business, except that in any direct action against the insurer of a policy or

contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business; and

(2) the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent, and the legal representative of an infant or incompetent shall be deemed to be a citizen only of the same State as the infant or incompetent.

(d) The word "States", as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico.

28 U.S.C. § 1441 provides:

§ 1441. Actions removable generally

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Whenever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title is joined with one or more otherwise nonremovable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters in which State law predominates.

(d) Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending. Upon removal the action shall be tried by the court without jury. Where removal is based upon this subsection, the time limitations of section 1446(b) of this chapter may be enlarged at any time for cause shown.

(e)(1) Notwithstanding the provisions of subsection (b) of this section, a defendant in a civil action in a State court may remove the action to the district court of the United States for the district and division embracing the place where the action is pending if –

(A) the action could have been brought in a United States district court under section 1369 of this title; or

(B) the defendant is a party to an action which is or could have been brought, in whole or in part, under section 1369 in a United States district court and arises from the same accident as the action in State court, even if the action to be removed could not have been brought in a district court as an original matter.

The removal of an action under this subsection shall be made in accordance with section 1446 of this title, except that a notice of removal may also be filed before trial of the action in State court within 30 days after the date on which the defendant first becomes a party to an action under section 1369 in a United States district court that arises from the same accident as the action in State court, or at a later time with leave of the district court.

(2) Whenever an action is removed under this subsection and the district court to which it is removed or transferred under section 1407(j) has made a liability determination requiring further proceedings as to damages, the district court shall remand the action to the State court from which it had been removed for the determination of damages, unless the court finds that, for the convenience of parties and witnesses and in the interest of justice, the action should be retained for the determination of damages.

(3) Any remand under paragraph (2) shall not be effective until 60 days after the district court has issued an order determining liability and has certified its intention to remand the removed action for the determination of damages. An appeal with respect to the liability determi-

nation of the district court may be taken during that 60-day period to the court of appeals with appellate jurisdiction over the district court. In the event a party files such an appeal, the remand shall not be effective until the appeal has been finally disposed of. Once the remand has become effective, the liability determination shall not be subject to further review by appeal or otherwise.

(4) Any decision under this subsection concerning remand for the determination of damages shall not be reviewable by appeal or otherwise.

(5) An action removed under this subsection shall be deemed to be an action under section 1369 and an action in which jurisdiction is based on section 1369 of this title for purposes of this section and sections 1407, 1697, and 1785 of this title.

(6) Nothing in this subsection shall restrict the authority of the district court to transfer or dismiss an action on the ground of inconvenient forum.

(f) The court to which a civil action is removed under this section is not precluded from hearing and determining any claim in such civil action because the State court from which such civil action is removed did not have jurisdiction over that claim.

28 U.S.C. § 1447 provides:

§ 1447. Procedure after removal generally

(a) In any case removed from a State court, the district court may issue all necessary orders and process to bring before it all proper parties whether served by process issued by the State court or otherwise.

(b) It may require the removing party to file with its clerk copies of all records and proceedings in such State court or may cause the same to be brought before it by writ of certiorari issued to such State court.

(c) A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

(e) If after removal the plaintiff seeks to join additional defendants whose joinder would destroy subject matter jurisdiction, the court may deny joinder, or permit joinder and remand the action to the State court.

17 C.F.R. § 240.10b-5 provides:

§ 240.10b-5. Employment of manipulative and deceptive devices

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

in connection with the purchase or sale of any security.

Supreme Court of the United States

Office of the Clerk
Washington, DC 20543-0001

WILLIAM K. SUTER
Clerk of the Court
(202) 479-3011

July 22, 2005

Mr. David C. Frederick
Kellogg Huber Hansen
Todd, Evans & Figel, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, DC 20036

Re: Carl Kircher, et al.
v. Putnam Funds Trust, et al.
Application No. 05A73

Dear Mr. Frederick:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Stevens, who on July 22, 2005 extended the time to and including August 30, 2005.

This letter has been sent to those designated on the attached notification list.

Sincerely,

William K. Suter, Clerk
by
/s/ GAIL JOHNSON
Gail Johnson
Case Analyst

[attached notification list omitted]

Supreme Court of the United States

Office of the Clerk
Washington, DC 20543-0001

WILLIAM K. SUTER
Clerk of the Court
(202) 479-3011

August 26, 2005

Mr. David C. Frederick
Kellogg Huber Hansen
Todd, Evans & Figel, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, DC 20036

Re: Carl Kircher, et al.
v. Putnam Funds Trust, et al.
Application No. 05A73

Dear Mr. Frederick:

The application for a further extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Stevens, who on August 26, 2005 extended the time to and including September 29, 2005.

This letter has been sent to those designated on the attached notification list.

Sincerely,

William K. Suter, Clerk
by
/s/ GAIL JOHNSON
Gail Johnson
Case Analyst

[attached notification list omitted]

No. 05-409

IN THE

Supreme Court of the United States

CARL KIRCHER, ET AL.,
Petitioners,

v.

PUTNAM FUNDS TRUST, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF LAW PROFESSORS ARTHUR R. MILLER AND E. FARISH PERCY AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

ARTHUR R. MILLER
1545 Massachusetts Avenue
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THOMAS G. GRIFFIN
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QUESTION PRESENTED

This brief is limited to Question 1 in the Petition for a Writ of Certiorari. That question is as follows:

Whether the court of appeals had jurisdiction, contrary to the holdings of three other circuits, to review a district court order remanding for lack of subject-matter jurisdiction a suit removed under the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"), notwithstanding 28 U.S.C. § 1447(d)'s bar on appellate review of remand orders based on lack of subject-matter jurisdiction and the district court's conclusion that petitioners' claims are not preempted by and thus not removable under SLUSA.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

INTERESTS OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

CONCLUSION 9

TABLE OF AUTHORITIES

CASES

Abada v. Charles Schwab & Co., 300 F.3d 1112 (9th Cir. 2002) 3, 7, 9

Beneficial Nat'l Bank v. Anderson, 539 U.S. 1 (2003) 7

Connecticut Nat'l Bank v. Germain, 503 U.S. 249 (1992) 6

Kircher v. Putnam Funds Trust, 373 F.3d 847 (7th Cir. 2004) 8

Spielman v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 332 F.3d 116 (2d Cir. 2003) 3, 7, 8

Thermtron Products, Inc. v. Hermansdorfer, 423 U.S. 336 (1976) 4, 5

Things Remembered, Inc. v. Petrarca, 516 U.S. 124 (1995) 4, 5

TMI Litig. Cases Consol. II, In re, 940 F.2d 832 (3d Cir. 1991) 4

United States v. American Library Ass'n, Inc., 539 U.S. 194 (2003) 6

United States v. Rice, 327 U.S. 742 (1946) 4, 5

Williams v. AFC Enters., Inc., 389 F.3d 1185 (11th Cir. 2004) 3

STATUTES AND RULES

Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 5

§ 5(a), 119 Stat. 12 (to be codified at 28 U.S.C. § 1453(c)(1)) 5

Securities Act of 1933, 15 U.S.C. §§ 77a *et seq.*:

15 U.S.C. § 77p(b) 6, 7

15 U.S.C. § 77p(c) 6, 7

Securities Exchange Act of 1934, 15 U.S.C. §§ 78a *et seq.*:

15 U.S.C. § 78bb(f)(1) 7

15 U.S.C. § 78bb(f)(2) 6

Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, 112 Stat. 3227 2

28 U.S.C. § 1447(d) 2, 3, 5, 8, 9

Sup. Ct. R. 37.6 1

INTERESTS OF *AMICI CURIAE*[1]

Professor Arthur. R. Miller is the Bruce Bromley Professor of Law at the Harvard Law School. He has devoted his teaching and writing career to an understanding of federal courts, civil procedure, and federal practice. Among his numerous publications are the leading treatise in federal practice and the leading casebook in civil procedure: Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* (West 2005); Jack H. Friedenthal, Arthur R. Miller, John E. Sexton & Helen Hershkoff, *Civil Procedure: Cases and Materials* (Thomson West 9th ed. 2005). In addition, he has written numerous articles and consulted on numerous cases raising novel issues of federal practice and procedure.

Assistant Professor E. Farish Percy joined the faculty at the University of Mississippi School of Law in 2001 and teaches Civil Procedure, Torts and Insurance.[2] Much of her recent research has been devoted to the issue of federal court

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[1] This brief of *amici curiae* is submitted on behalf of Professors Arthur R. Miller and E. Farish Percy. The parties have consented to the filing of this brief. The letter reflecting petitioners' consent is being filed with the office of the Clerk contemporaneously with the filing of this brief; the letter reflecting respondents' consent is being filed with the office of the Clerk by counsel for respondents directly. In accordance with Rule 37.6, counsel states that this brief was authored by counsel with the input and assistance of *amici*, and was not authored in whole or in part by counsel for any party. No person or entity, other than *amici* and their counsel submitting this brief on behalf of *amici*, made a monetary contribution to the preparation or submission of the brief.

[2] Professor Percy obtained her J.D. from the University of Virginia in 1991, where she was a member of the Virginia Law Review and Order of the Coif. After graduating, she clerked for Judge E. Grady Jolly of the United States Court of Appeals for the Fifth Circuit. Professor Percy practiced law for eight years with the Tollison Law Firm, P.A. in Oxford, Mississippi, where she concentrated in tort litigation, commercial litigation, and appellate practice. She tried numerous civil cases in state and federal courts in Mississippi and briefed and argued several appellate cases before the United States Court of Appeals for the Fifth Circuit and the Mississippi Supreme Court.

jurisdiction. She has recently written two law journal articles proposing a framework to be used by federal district courts when evaluating allegations of fraudulent joinder in cases where removal is based on federal diversity jurisdiction.[3] In both, she emphasizes that the fraudulent joinder doctrine should be structured so as to ensure that the federal courts do not exceed their limited statutory jurisdiction and also to address the federalism concerns raised when cases are removed from state to federal court.

Having devoted their careers to teaching and writing about the federal courts and working for their improved administration, *amici* have a keen interest in seeing that those courts function efficiently. It is equally important that the lower federal courts function only as Congress has authorized. Unless the court below is reversed, appellate panels (at least in the Seventh Circuit) will continue to entertain appeals that Congress has specifically prohibited.

SUMMARY OF ARGUMENT

The Securities Litigation Uniform Standards Act of 1998 ("SLUSA") preempts certain state law securities cases and makes those cases removable to federal court. If, following an attempted removal under SLUSA, the federal district court determines that the plaintiffs' claims are not preempted and accordingly not subject to removal, the district court must remand the action to state court. Congress has prohibited appellate review of a district court's order remanding a removed case to state court for lack of subject matter jurisdiction. 28 U.S.C. § 1447(d). Until the ruling by the court below, the circuit courts that have considered the matter had determined that section 1447(d) precluded appellate review of a remand order under SLUSA.

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[3] E. Farish Percy, *Making a Federal Case of It: Removing Civil Cases to Federal Court Based on Fraudulent Joinder*, 91 Iowa L. Rev. __ (forthcoming late 2005); E. Farish Percy, *Defining the Contours of the Emerging Fraudulent Misjoinder Doctrine*, 29 Harv. J.L. & Pub. Pol'y __ (forthcoming March 2006).

The Seventh Circuit, however, found for the first time that such a remand order is reviewable. In a ruling that conflicts with holdings in three other circuits,[4] the court below held that section 1447(d) does not apply to a district court's remand ruling if the action was removed to federal court under SLUSA. The court reasoned that SLUSA vests the federal district courts with subject matter jurisdiction over all proceedings falling within the definition of a "class covered action" — even if the claims are not preempted under SLUSA — and that a district court remand of the action accordingly could not be premised upon lack of subject matter jurisdiction. As characterized by the Seventh Circuit, an action removed to federal court under SLUSA, even if it must be remanded because it falls outside of those actions that SLUSA preempts, is "a case properly removed and remanded only when the federal job is done."

This Court should grant certiorari with respect to this issue. The ruling below creates a clear conflict among the circuits. Although the court below sought in its decision to belittle the magnitude of the conflict, this rift between the circuits undermines the very purpose of SLUSA. Regardless of which circuit reached the correct result, the conflict among the circuits provides an incentive to plaintiffs to file actions subject to possible SLUSA removal in New York or California, rather than Illinois, merely because a remand of such actions after removal will not be subject to review in New York or California, but would be subject to review in Illinois. Certiorari should also be granted in this case because the court below erred, and premised its ruling upon a tortured construction of the statute and a cavalier rejection of well-reasoned contrary rulings in other circuits.

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[4] *See Williams v. AFT Enters., Inc.*, 389 F.3d 1185 (11th Cir. 2004); *Spielman v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 332 F.3d 116, 123 (2d Cir. 2003); *Abada v. Charles Schwab & Co.*, 300 F.3d 1112, 1119 (9th Cir. 2002).

ARGUMENT

From the inception of the Republic, remand orders for lack of subject matter jurisdiction or for defects in the removal procedure have been unreviewable on appeal except during a short-lived period between 1875 and 1887. *United States v. Rice*, 327 U.S. 742, 749 (1946) ("save for a brief interval under § 5 of the Act of 1875, . . . an order of remand was not appealable"); *In re TMI Litig. Cases Consol. II*, 940 F.2d 832, 840 (3d Cir. 1991) ("[w]ith the brief exception . . . of the period between 1875 and 1887, Congress, by adopting section 1447(d) and its statutory predecessors," prohibited the review of remand orders). The time-honored bar to appellate review of remand orders rests upon Congress's explicit legislative choice and "policy of not permitting interrupting of the litigation of the merits of a removed cause by prolonged litigation of questions of jurisdiction of the district court to which the cause is removed." *Rice*, 327 U.S. at 751.

Prior to this Court's decision in *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1976), the statutory prohibition "precluded review of all remand orders, regardless of the reasons underlying the decision to remand." *TMI Litig.*, 940 F.2d at 840. "As we explained in *Thermtron*, § 1447(d) must be read *in pari materia* with § 1447(c), so that only remands based on grounds specified in § 1447(c) are immune from review under § 1447(d)." *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 127 (1995) (citation omitted). "Although the rule that most remand orders are not subject to review remains, *Thermtron* made clear that the seemingly unequivocal language of section 1447(d), may, in extraordinary circumstances, give way to permit appellate consideration of certain categories of remand orders." *TMI Litig.*, 940 F.2d at 841. When "a district court's remand is based on a timely raised defect in removal procedure or on lack of subject-matter jurisdiction — the grounds for remand recognized by § 1447(c) — a court of appeals lacks jurisdiction to entertain an appeal of the remand order under § 1447(d)." *Things Remembered,*

516 U.S. at 127-28. Thus, even after *Thermtron*, there remain "broad restrictions on the power of federal appellate courts to review district court orders remanding removed cases to state court." *Id.* at 127.

Moreover, and of particular concern in the present case, section 1447(d)'s bar to appellate review applies "regardless of whether removal was effected pursuant to § 1441(a)" (which is the general removal statute) or "under *any other statutes*, as well." *Things Remembered*, 516 U.S. at 128 (quoting Rice, 327 U.S. at 752). "Absent a clear statutory command to the contrary, we assume that Congress is 'aware of the universality of th[e] practice' of denying appellate review of remand orders when Congress creates a new ground for removal." *Id.*

Congress has provided such a "clear statutory command" in a few instances. For example, section 1447(d) itself provides that civil rights cases "removed pursuant to section 1443 of this title ***shall be reviewable*** by appeal or otherwise." Similarly, the recently enacted Class Action Fairness Act of 2005,[5] Pub. L. No. 109-2, 119 Stat. 4, provides that, "notwithstanding section 1447(d), a court of appeals may accept an appeal from an order of a district court granting or denying a motion to remand a class action to the State court from which it was removed if application is made to the court of appeals not less than 7 days after entry of the order." Section 5(a), 119 Stat. 12 (to be codified at 28 U.S.C. § 1453(c)(1)).

SLUSA contains no such "clear statutory command" authorizing the review of SLUSA remand orders. Rather, SLUSA merely authorizes the removal of a specific class of securities cases:

> Removal of covered class actions
>
> Any covered class action brought in any State court involving a covered security, ***as set forth in subsection (b) of this section***, shall be removable to the Federal

---

[5] The Class Action Fairness Act makes certain state court class actions commenced on or after February 18, 2005, removable to federal court.

> district court for the district in which the action is pending, and shall be subject to subsection (b).

15 U.S.C. § 77p(c) (emphasis added); *accord id.* § 78bb(f)(2).

In order to rationalize its ruling, the court below disassociated the subsection (c) analysis from the subsection (b) requirements. The plain words of the statute, however, require the district court to evaluate whether claims fall within the ambit of subsection (b) in order to determine whether they are removable in the first instance. The "as set forth in subsection (b)" language is clearly both mandatory and delimiting. Had Congress intended to authorize the removal of every covered class action involving a covered security, it could easily have provided that "any covered class action brought in any State court involving a covered security shall be removable." If, as the court below held, this were the proper interpretation of subsection (c), then the words "as set forth in subsection (b) of this section" have no distinct meaning of their own.[6] Of course, canons of construction generally preclude such a conclusion which renders statutory language superfluous. *United States v. American Library Ass'n, Inc.*, 539 U.S. 194, 233 (2003) ("[c]ourts should disfavor interpretations of statutes that render language superfluous") (quoting *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992)).

The subset of cases "as set forth in subsection (b)" consists of those "covered class actions" which SLUSA also preempts. Subsection (b) of the statute provides:

> No covered class action based upon the statutory or common law of any State or subdivision thereof may

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[6] As purely a matter of English grammar, the language "as set forth in subsection (b) of this section" could be understood to modify the immediately preceding phrase, "a covered security." In context, however, this interpretation makes no sense because subsection (b) does not "set forth" a description of covered securities. Instead, subsection (b) sets forth a category of cases which cannot "be maintained in any State or Federal court . . . ." The conclusion that the "as set forth" language describes a subset of "covered class actions involving a covered security" is therefore inescapable.

> be maintained in any State or Federal court by any private party alleging —
>
> (1) an untrue statement or omission of a material fact in connection with the purchase or sale of a covered security; or
>
> (2) that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security.

15 U.S.C. § 77p(b); *accord id.* § 78bb(f)(1). Subsection (b) thus "sets forth" a defined set of covered class actions and preempts them. Subsection (c), in turn, makes those preempted class actions removable: "preemption and the existence of subject matter jurisdiction . . . are the opposite sides of the same coin." *Spielman*, 332 F.3d at 132 (Newman, J., concurring).

The kind of preemption that SLUSA employs is a species of federal jurisdiction that federal courts have recognized under the "complete preemption" doctrine.

> When [a] federal statute completely pre-empts [a] state-law cause of action, a claim which comes within the scope of that cause of action, even if pleaded in terms of state law, is in reality based on federal law. This claim is then removable under 28 U.S.C. § 1441(b), which authorizes any claim that "arises under" federal law to be removed to federal court.

Beneficial Nat'l Bank v. Anderson, 539 U.S. 1, 8 (2003). Other lower courts have recognized that SLUSA preemption is "complete preemption." *See, e.g., Spielman*, 332 F.3d at 123 ("SLUSA was intended to completely preempt the field of *certain types* of securities class actions") (emphasis in original); *Abada*, 300 F.3d at 1119 ("the district court was required to decide whether Abada's claims were completely preempted by SLUSA").

Because a district court's removal jurisdiction under SLUSA extends only to those covered class actions which SLUSA preempts, a district court's remand of a case to state

court on the grounds that SLUSA does not preempt the case is, *a priori*, a remand for lack of removal jurisdiction. The plain language of SLUSA permits no other conclusion. "Congress could not have spoken more clearly." *Spielman*, 332 F.3d at 123. As a result, a remand order based on the conclusion that SLUSA does not preempt the case is the very kind of remand for lack of subject matter jurisdiction which Congress has forbidden appellate courts to review on "appeal or otherwise." 28 U.S.C. § 1447(d).

The Seventh Circuit's conclusion that SLUSA remand orders are not remands for lack of subject matter jurisdiction (and are thus reviewable on appeal) depends upon an untenable reading of SLUSA. According to the appellate court, "[b]ecause plaintiffs represent more than 50 investors, this is a 'covered class action' and a federal judge is not only authorized but also required to decide whether any court may entertain the litigation." *Kircher v. Putnam Funds Trust*, 373 F.3d 847, 849 (7th Cir. 2004). For reasons already discussed, this interpretation of SLUSA's removal provision is not just a misreading of the statute, it is a judicial revision of the statute which eliminates the phrase "as set forth in subsection (b)."

The Second, Ninth and Eleventh Circuits' holdings that SLUSA remand orders are unappealable remands for lack of subject matter jurisdiction are sound. Moreover, the Seventh Circuit's sole criticism of the Second and Ninth Circuits — that those courts were "mesmerized by the word 'jurisdiction'" (*Kircher*, 373 F.3d at 851) — is unfounded. The district court in *Spielman* did *not* expressly remand for lack of subject matter jurisdiction. As a result, the Second Circuit was first required to discern whether the remand order was a remand for lack of subject matter. *Spielman*, 332 F.3d at 128-29 ("the district court never used the words 'subject matter jurisdiction,' 'federal question jurisdiction,' or even 'jurisdiction' when ordering a remand," but "[o]ur reading of the remand order convinces us that the remand could not have been predicated on anything other than the district court's determination that it lacked subject matter jurisdiction under SLUSA"). The Second Circuit thus could not possibly

have been "mesmerized" by the district court's use of a word ("jurisdiction") which the district court never used.

Similarly, in *Abada*, the Ninth Circuit expressly recognized that it was "not bound by the district court's characterization of its authority for remand," and that, if it "concluded that the district court's order was the result of an exercise of discretion, we could review it. However, such is not the case here." 300 F.3d at 1117. The Ninth Circuit recognized that the district court's "resolution of the substantive legal question" of preemption "was a necessary predicate to deciding the existence of subject matter jurisdiction." *Id.* at 1118. Thus, the Ninth Circuit was also not "mesmerized" by a district court's injudicious use of the word "jurisdiction." The issue of appellate jurisdiction was correctly decided in both cases based upon SLUSA's plain language and that of section 1447(d).

CONCLUSION

The Court should grant certiorari to hear this case. The twin issues of SLUSA removal jurisdiction and appellate jurisdiction to review SLUSA remand orders are important ones. The circuits where most securities litigation arises — the Second, Seventh and Ninth — have authoritatively decided the issue, and there is no reason to think a better opportunity will present itself for resolving the current circuit conflict. These important jurisdictional issues involve lines of authority that Congress has drawn, lines that should always be drawn bright and clear. They also involve an important issue of federalism. The petition for a writ of certiorari should be granted with regard to Question 1 of the Questions Presented.

Respectfully submitted,

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November 29, 2005

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Law Professors Arthur R. Miller and E. Farish Percy

No. 05-409

IN THE

Supreme Court of the United States

CARL KIRCHER, ET AL.,

Petitioners,

v.

PUTNAM FUNDS TRUST, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether the court of appeals correctly exercised appellate jurisdiction to review the district court's determination that petitioners' claims are not precluded by the Securities Litigation Uniform Standards Act of 1998 (SLUSA).

II. Whether the court of appeals correctly determined that petitioners' claims allege misconduct "in connection with" the purchase or sale of securities, and thus are precluded by SLUSA.

RULE 29.6 STATEMENT

Respondent Artisan Partners Limited Partnership has no parent corporation, and no publicly held company owns 10% or more of its stock. This respondent is a limited partnership, the general partner of which is Artisan Investment Corporation, which has no parent corporation, and no publicly held company owns 10% or more of its stock.

Respondent Artisan Funds, Inc. has no parent corporation, and no publicly held company owns 10% or more of its stock.

Respondent Columbia Wanger Asset Management, LP has no parent corporation, and no publicly held company owns 10% or more of its stock. This respondent is a limited partnership, the general partner of which is CWAM Acquisition GP, Inc., which is a wholly owned subsidiary of Columbia Management Group, Inc., which in turn is a wholly owned subsidiary of Fleet National Bank, which in turn is a subsidiary of Bank of America Corporation, a publicly traded company.

Respondent Columbia Acorn Trust has no parent corporation, and no publicly held company owns 10% or more of its stock.

Respondent Deutsche Investment Management Americas Inc. is a wholly owned subsidiary of Deutsche Bank Americas Holding Corp., which is a wholly owned subsidiary of Taunus Corporation, which is a wholly owned subsidiary of Deutsche Bank AG, a publicly traded company that owns 10% or more of respondent's stock. No other publicly held company owns 10% or more of its stock.

Respondent Janus Capital Management LLC is a wholly owned subsidiary of Janus Capital Group Inc., a publicly traded company that owns 10% or more of respondent's stock. No other publicly held company owns 10% or more of its stock.

Respondent Janus Investment Fund has no parent corporation, and no publicly held company owns 10% or more of its stock.

Respondent Pacific Life Insurance Company is a wholly owned subsidiary of Pacific Life Corporation, a private stock holding company. No publicly held company owns 10% or more of respondent's stock.

Respondent Putnam Investment Management, LLC is an indirect subsidiary of Marsh & McLennan Companies, Inc., a publicly traded company that owns 10% or more of respondent's stock. No other publicly held company owns 10% or more of its stock.

Respondents Putnam Funds Trust, Putnam International Equity Fund, and Putnam Investment Funds have no parent corporation and no publicly held company owns 10% or more of their stock.

Respondent Scudder International Fund, Inc. has no parent corporation, and no publicly held company owns 10% or more of its stock.

Respondent Van Kampen Investment Advisory Corporation merged on November 30, 2003, into Van Kampen Asset Management, which is a wholly owned subsidiary of Van Kampen Investments, Inc., which is a wholly owned subsidiary of MSAM Holding II Inc., which is a wholly owned subsidiary of Morgan Stanley, a publicly traded company that owns 10% or more of respondent's stock. No other publicly held company owns 10% or more of its stock.

Respondent Van Kampen Series Fund, Inc. has no parent corporation, and no publicly held company owns 10% or more of its stock.

TABLE OF CONTENTS

STATEMENT 1

DISCUSSION 9

I. The Seventh Circuit's Exercise Of Appellate Jurisdiction Does Not Warrant Plenary Review 10

A. The Asserted Conflict Need Not Be Resolved At This Time 11

B. The Decision Below Is Correct 15

II. The Seventh Circuit's Construction Of SLUSA Does Not Warrant Plenary Review 18

A. The Asserted Conflict Will Be Resolved In *Dabit* 18

B. The Decision Below Is Correct 21

CONCLUSION 22

TABLE OF AUTHORITIES

Cases

Abada v. *Charles Schwab & Co.*,
300 F.3d 1112 (9th Cir. 2002) 6, 10

In re Amoco Petroleum Additives Co.,
964 F.2d 706 (7th Cir. 1992) 6

Ariail Drug Co. v. *Recomm Int'l Display*,
122 F.3d 930 (11th Cir. 1997) 12

Bell v. *Hood*,
327 U.S. 678 (1946) 6, 17

Blue Chip Stamps v. *Manor Drug Stores*,
421 U.S. 723 (1975) ..... *passim*

Bradfisch v. *Templeton Funds, Inc.*,
No. 03-CV-0760-MJR
(S.D. Ill. Jan. 23, 2004) 4

Carnegie-Mellon Univ. v. *Cohill*,
484 U.S. 343 (1988) 5

Dabit v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*,
395 F.3d 25 (2d Cir. 2005),
cert. granted, No. 04-1371 ..... *passim*

Disher v. *Citigroup Global Mkts., Inc.*,
419 F.3d 649 (7th Cir. 2005) 11

Dudek v. *Prudential Secs., Inc.*,
295 F.3d 875 (8th Cir. 2002) 15

Falkowski v. *Imation Corp.*,
309 F.3d 1123 (9th Cir. 2002) 7, 8

Green v. *Ameritrade, Inc.*,
279 F.3d 590 (8th Cir. 2002) 7, 8

Gutierrez de Martinez v. *Lamagno*,
515 U.S. 417 (1995) 17

Holmes v. *SIPC*,
503 U.S. 258 (1992) 9, 21

Izumi Seimitsu Kogyo Kabashiki Kaisha v.
United States Philips Corp.,
510 U.S. 27 (1993) 20

Jamison v. *Wiley*,
14 F.3d 222 (4th Cir. 1994) 17

In re Janus Mut. Funds Inv. Litig.,
310 F. Supp. 2d 1359 (J.P.M.L. 2004) 4

Jefferson County v. *Acker*,
527 U.S. 423 (1999) 16

Kontrick v. *Ryan*,
540 U.S. 443 (2004) 6, 10, 11

McCray v. *New York*,
461 U.S. 961 (1983) 13

In re Mut. Funds Inv. Litig.,
384 F. Supp. 2d 845 (D. Md. 2005) 5

Oklahoma Tax Comm'n v. *Graham*,
489 U.S. 838 (1989) 16

Osborn v. *Bank of United States*,
22 U.S. (9 Wheat.) 738 (1824) 15

Quackenbush v. *Allstate Ins. Co.*,
517 U.S. 706 (1996) 5, 6

Riley v. *Merrill Lynch, Pierce, Fenner*
& Smith, Inc.,
292 F.3d 1334 (11th Cir. 2002) 7, 8

Rowinski v. *Salomon Smith Barney Inc.*,
398 F.3d 294 (3d Cir. 2005) 7, 13

Scarborough v. *Principi*,
541 U.S. 401 (2004) 6, 10, 11

SEC v. *Zandford*,
535 U.S. 813 (2002) 9, 20, 21

Spielman v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*,
332 F.3d 116 (2d Cir. 2003) 6, 10

Superintendent of Ins. v. *Bankers Life & Cas. Co.*, 404 U.S. 6 (1971) 9

Taylor v. *Freeland & Kronz*,
503 U.S. 638 (1992) 20

Thermtron Prods., Inc. v. *Hermansdorfer*,
423 U.S. 336 (1976) 5

Things Remembered, Inc. v. *Petrarca*,
516 U.S. 124 (1995) 5, 6

United Investors Life Ins. Co. v. *Waddell & Reed, Inc.*,
360 F.3d 960 (9th Cir. 2004) 6, 10

United States v. *Naftalin*,
441 U.S. 768 (1979) 9

United States v. *O'Hagan*,
521 U.S. 642 (1997) 9, 21

Venezia v. *Robinson*,
16 F.3d 209 (7th Cir. 1994) 16

Verlinden B.V. v. *Central Bank of Nig.*,
461 U.S. 480 (1983) 15

Waco v. *United States Fid. & Guar. Co.*,
293 U.S. 140 (1934) 17

Williams v. *AFC Enters., Inc.*,
389 F.3d 1185 (11th Cir. 2004) 12

Willingham v. *Morgan*,
395 U.S. 402 (1969) 16, 17

Statutes and Regulation

Class Action Fairness Act of 2005, § 5(a),
Pub. L. No. 109-2, 119 Stat. 12
(codified at 28 U.S.C. § 1453(c)(1)) 13

Investment Company Act of 1940, § 2(a)(39),
Pub. L. No. 76-768, 54 Stat. 796
(as amended) (codified at 15 U.S.C.
§ 80a-2(a)(41)(B)(ii)) 3

Judicial Code & Judiciary, Pub. L. No. 80-773
(1948), 62 Stat. 938-39 (as amended):

28 U.S.C. § 1442 16

28 U.S.C. § 1442(a)(1) 16

28 U.S.C. § 1447(c) 5, 11

28 U.S.C. § 1447(d) 5, 12, 15, 17

Securities Act of 1933, Tit. I § 22,
Pub. L. No. 73-22, 48 Stat. 86-87
(as amended) (codified at 15 U.S.C.
§ 77v(a)) 12

Securities Litig. Uniform Standards Act of 1998,
Tit. I § 101, Pub. L. No. 105-353, 112 Stat.
3227-33:

15 U.S.C. § 77p(b) 4, 12

15 U.S.C. § 77p(c) 15

15 U.S.C. § 77p(d)(4) 4

15 U.S.C. § 78bb(f)(1) 4, 12

15 U.S.C. § 78bb(f)(2) 15, 16

15 U.S.C. § 78bb(f)(3)(D) 4

17 C.F.R. § 270.2a-4(a) 3

Other Authorities

SEC Div. of Inv. Mgmt., *Letter to the ICI Regarding Valuation Issues*, 2001 SEC No-Act. LEXIS 543 (Apr. 30, 2001) 2, 3

SEC Rel. No. 33-7512, 63 Fed. Reg. 13,916 (Mar. 23, 1998) 3

SEC Rel. No. IC-14244, 49 Fed. Reg. 46,558 (Nov. 27, 1984) 3

Robert L. Stern et al., *Supreme Court Practice* § 4.4 (8th ed. 2002) 11

BRIEF IN OPPOSITION

Respondents respectfully submit that the petition for a writ of certiorari should be denied.

STATEMENT

After removal, the district court held that petitioners' state-law claims are not precluded by the Securities Litigation Uniform Standards Act of 1998 (SLUSA). The court of appeals reversed, directing the dismissal of petitioners' claims pursuant to SLUSA.

1. Respondents are either investment companies (commonly known as mutual funds) or entities that provide advisory services to mutual funds (investment advisers).[1] They are registered with, and regulated by, the Securities and Exchange Commission (SEC) pursuant to the Investment Company Act of 1940 or the Investment Advisers Act of 1940. Their securities (both common stock and mutual fund shares) are subject to the Securities Act of 1933, and their operations are governed by the Securities Exchange Act of 1934. *See* Pet. App. 10a.

Petitioners are individuals who allegedly purchased shares in mutual funds offered or advised by respondents. *See* Resp. C.A. Br. 1 n.1 (pairing particular petitioners and respondents). They brought putative class actions in Illinois state court on behalf of "all persons in the United States who have held shares of [the fund] for more than fourteen days from the date of purchase to the date of sale (redemption) or exchange." Pet. 8 (quoting complaints).

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[1] One of the respondents is an insurance company that allows mutual fund investments through its variable annuity products. This distinction has no bearing on the questions presented.

Petitioners allege that respondents "set the fund share price (NAV) once every business day at the close of trading on the New York Stock Exchange at 4:00 p.m. Eastern Time," and that, to do so, respondents "use the last trade price in the home market of each of the securities in [their] portfolio[s]." App., *infra*, 5a.[2] These allegations reflect the requirements of the Investment Company Act of 1940 (ICA) and associated regulations, pursuant to which mutual funds typically "calculate their NAVs once each day at or near the close of the major U.S. securities exchanges and markets (usually 4:00 p.m., Eastern Time . . .)" and "generally calculate their NAVs by using the closing prices of portfolio securities on the exchange or market (whether foreign or domestic) on which the securities principally trade." SEC Div. of Inv. Mgmt., *Letter to the ICI Regarding Valuation Issues*, 2001 SEC No-Act. LEXIS 543, at *2 (Apr. 30, 2001).

Petitioners further allege that a "significant portion of the securities in [respondents'] portfolios are foreign securities" that trade on exchanges "located in time zones that are five hours to fifteen hours ahead of Eastern Standard Time." App., *infra*, 5a. As a result of this time-zone difference, petitioners allege that "the closing prices of the foreign securities in the underlying portfolio may not reflect current market values at the time [respondents] set their fund NAV." *Ibid.* Petitioners complain that despite "knowledge of . . . the stale price[s] of the foreign securities in [their] underlying portfolio[s]," respondents "do not make any value adjustment to the portfolio's foreign securities prior to calculating fund NAV and setting share price every business day." *Id.* at 5a-6a.

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[2] Petitioners have included only limited excerpts of their complaints with their petition. *See* Pet. App. 66a-117a. For convenience, respondents include the complete text of a representative complaint (*Potter*) in the Appendix to this brief. *See also* C.A. App. 135a-319a (complete text of all complaints).

The ICA, which governs the NAV calculations for these nationally traded securities, does not require (or even permit) funds to estimate the "fair value"—*i.e.*, a valuation that differs from the closing price—of portfolio securities unless market quotations are not readily available. 15 U.S.C. § 80a-2(a)(41)(B)(ii); 17 C.F.R. § 270.2a-4(a). When market quotations are readily available, "funds are not permitted to ignore these quotations and fair value price the securities" because to do so "would not be consistent with a fund's obligation under the 1940 Act and could result in an incorrect NAV." 2001 SEC No-Act. LEXIS 543, at *19-*20; *see also* SEC Rel. No. 33-7512, 63 Fed. Reg. 13,916, 13,933 (Mar. 23, 1998); SEC Rel. No. IC-14244, 49 Fed. Reg. 46,558, 46,559 n.7 (Nov. 27, 1984).

Notwithstanding the clear requirements of federal law, petitioners charge that "[b]y failing to make daily adjustments . . . and by choosing to use stale prices in valuing their fund shares and setting their daily NAVs, [respondents] have exposed long term shareholders to market timing traders who regularly purchase and redeem [mutual fund] shares as part of a profitable trading strategy." App., *infra*, 9a. Petitioners claim that respondents urged them to invest for the long term, but failed to provide complete and accurate information regarding NAV pricing, the opportunity for market-timing and other arbitrage, and the impact of such trades on other investors. *Id.* at 4a, 9a-12a. They contend that the "excess profits that are obtained by market timing traders' taking advantage of the stale pricing of [mutual fund] shares come at the expense of fellow shareholders." *Id.* at 10a. Petitioners complain that, by allegedly facilitating market-timing trading in this fashion, respondents breached duties purportedly owed to shareholders under state common law. *Id.* at 17a-18a. Petitioners sought damages (including punitive damages), interest, and attorneys' fees. *Id.* at 19a-20a.

2. Respondents removed the cases to federal court on the ground, *inter alia*, that petitioners' claims are governed by SLUSA, which precludes state-law class actions that allege specified misconduct—a material misstatement or omis-

sion, or the use of a manipulative or deceptive device—"in connection with" the purchase or sale of securities. *See* 15 U.S.C. §§ 77p(b) & 78bb(f)(1). Petitioners' sole objection to removal (and dismissal) under SLUSA was that the "in connection with" requirement was not met because they ostensibly were mere "holders," rather than purchasers or sellers, of mutual fund shares. Pet. App. 6a.

In a series of nearly identical orders, the district court ruled that SLUSA's "in connection with" requirement was not met in these cases because "[t]here is no claim asserted by a purchaser or seller; the claims are brought by those who *held* shares." Pet. App. 30a. The court concluded that "[t]hese claims are not actionable under [§ 10(b) of the Securities Exchange Act of 1934], and they are not removable under SLUSA." *Ibid.* (citing *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723 (1975)); *see also*, *e.g.*, Pet. App. 61a (because petitioner "brings dilution claims as a *holder* of securities" and "does not assert any claim as a *purchaser* or *seller*," his "state law claims are not cognizable under the 1934 Act, and SLUSA does not preempt them"). The same reasoning was adopted in each of these cases. *Id.* at 26a-27a; 39a-40a; 43a-45a; 50a-51a; 56a-57a; 61a; *see also Bradfisch* v. *Templeton Funds, Inc.*, No. 03-CV-0760-MJR (S.D. Ill. Jan. 23, 2004) (C.A. App. 328a-335a).

Having rejected respondents' federal defense on the merits, the district court remanded the cases to state court as required by SLUSA. 15 U.S.C. §§ 77p(d)(4) & 78bb(f)(3)(D) ("if the Federal court determines that the action may be maintained in State court pursuant to this subsection, the Federal court shall remand such action to such State court").[3]

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[3] More than 400 lawsuits alleging market timing in various mutual funds, including respondents' funds, have been transferred for coordinated pretrial proceedings in the District of Maryland. *See In re Janus Mut. Funds Inv. Litig.*, 310 F. Supp. 2d 1359 (J.P.M.L. 2004). That court recently held that

[Footnote continued on next page]

3. Respondents appealed the rejection of their SLUSA-preclusion defense to the Seventh Circuit. That court ultimately consolidated the cases under a single caption and reversed the district court's ruling on SLUSA.

a. The court of appeals (*Easterbrook*, Evans and Williams, JJ.) first determined that it had jurisdiction to consider respondents' appeal. Pet. App. 10a-17a. The court recognized that 28 U.S.C. § 1447(d) precludes appellate review of remand orders that are based on § 1447(c). *Id.* at 12a (citing *Thermtron Prods., Inc.* v. *Hermansdorfer*, 423 U.S. 336 (1976), and *Things Remembered, Inc.* v. *Petrarca*, 516 U.S. 124 (1995)). The court ruled, however, that a remand under SLUSA "is not within § 1447(c) or equivalent to it, for [it] comes at the end rather than the outset of federal adjudication." *Id.* at 13a. As the court noted, "[t]he Supreme Court has itself reviewed remand decisions that fall outside the scope of § 1447(c)." *Ibid.* (citing *Thermtron*; *Quackenbush* v. *Allstate Ins. Co.*, 517 U.S. 706 (1996); and *Carnegie-Mellon Univ.* v. *Cohill*, 484 U.S. 343 (1988)).

The court of appeals rejected petitioners' contention that a SLUSA-based remand connotes a lack of subject-matter jurisdiction, and thus is governed by § 1447(c). "[T]he Supreme Court has observed that a court lacks 'subject-matter jurisdiction' only when Congress has not authorized the federal judiciary to resolve the sort of issue presented by the

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state-law claims analogous to petitioners' are precluded by SLUSA. *In re Mut. Funds Inv. Litig.*, 384 F. Supp. 2d 845, 871-72 (D. Md. 2005). The Maryland court also held that certain federal claims—asserted by the same putative classes, and asserting the same alleged misconduct—could proceed, giving the lie to petitioners' assertion that "[p]ermitting the Seventh Circuit's ruling to stand would deprive the victims of market timing of any avenue of recourse in the state or federal courts." Pet. 30.

case (or the Constitution forbids adjudication)." Pet. App. 13a (citing *Kontrick* v. *Ryan*, 540 U.S. 443 (2004), and *Scarborough* v. *Principi*, 541 U.S. 401 (2004)). Under SLUSA, "a federal judge is not only authorized but also required to decide whether any court may entertain the litigation," and "[a]fter making the decision required by [SLUSA], the district court had nothing else to do: dismissal and remand are the only options." *Id.* at 14a. To "say that jurisdiction evaporated at that juncture . . . would be tautological," the court explained, because "[o]therwise every federal suit, having been decided on the merits, would be dismissed 'for lack of jurisdiction' because the court's job was finished." *Ibid.* (citing *Bell* v. *Hood*, 327 U.S. 678 (1946)).

The Seventh Circuit "recognize[d] that two courts of appeals have held that disputes about the application of [SLUSA] cannot be resolved by federal appellate judges." Pet. App. 15a-16a (citing *Spielman* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 332 F.3d 116 (2d Cir. 2003); *United Investors Life Ins. Co.* v. *Waddell & Reed, Inc.*, 360 F.3d 960 (9th Cir. 2004); and *Abada* v. *Charles Schwab & Co.*, 300 F.3d 1112 (9th Cir. 2002)). These courts, the Seventh Circuit explained, failed to appreciate "the difference between a case that never should have been removed and a case properly removed and remanded only when the federal job is done." *Ibid.* Section 1447(d) does not preclude appellate review of cases in the latter category. *In re Amoco Petroleum Additives Co.*, 964 F.2d 706, 708 (7th Cir. 1992) ("we understand *Carnegie-Mellon* to permit review when the district judge believes that removal was proper and that later developments authorize remand"). The Seventh Circuit explained that it "could not follow the [S]econd and [N]inth [C]ircuits without overruling *Amoco Petroleum Additives*" and other Seventh Circuit precedent; but "[b]ecause *Amoco Petroleum Additives* has the support of at least three other [C]ircuits [the Fourth, Fifth, and Eleventh]—not to mention *Things Remembered* and *Quackenbush*—overruling would be inappropriate." Pet. App. 16a-17a. The opinion was circulated before release to all of the Circuit's active judges, none of whom "favored a hearing en banc." *Id.* at 17a.

b. In its second decision, the court of appeals (*Easterbrook*, Ripple and Wood, JJ.) concluded that petitioners' claims are precluded by SLUSA. Pet. App. 1a-9a. The court recognized that SLUSA's "in connection with" requirement was borrowed from § 10(b) of the Exchange Act and Rule 10b-5 thereunder because "SLUSA is designed to prevent plaintiffs from migrating to state court in order to evade rules for federal securities litigation in the Private Securities Litigation Reform Act of 1995" (PSLRA) and "SLUSA can do its job only if [it] covers those claims that engage Rule 10b-5 (and thus come within the [PSLRA]) if presented directly under federal law." Pet. App. 5a. The court noted that "[e]very court of appeals to encounter SLUSA has held that its language has the same scope as its antecedent in Rule 10b-5." Pet. App. 5a (citing *Dabit* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 395 F.3d 25 (2d Cir. 2005), *cert. granted*, No. 04-1371; *Rowinski* v. *Salomon Smith Barney Inc.*, 398 F.3d 294 (3d Cir. 2005); *Green* v. *Ameritrade, Inc.*, 279 F.3d 590 (8th Cir. 2002); *Falkowski* v. *Imation Corp.*, 309 F.3d 1123 (9th Cir. 2002); and *Riley* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 292 F.3d 1334 (11th Cir. 2002)). "Unfortunately, however, the other circuits do not agree among themselves (or with the SEC) what Rule 10b-5 itself means. The phrase 'in connection with the purchase or sale' of a security is the sticking point." *Ibid.*

In *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723 (1975), this Court held that persons who had not themselves purchased or sold securities could not maintain a private action for damages under Rule 10b-5. Petitioners "insist that any private action that is untenable after *Blue Chip Stamps* also is unaffected by SLUSA." Pet. App. 6a-7a. They sought to avoid SLUSA's preclusive reach by "fram[ing] complaints that avoid any allegations of purchase or sale"; instead, petitioners' class definitions included "investors who held shares of a given mutual fund between two specified dates." *Id.* at 6a.

The Seventh Circuit held that even "[a]ssuming that SLUSA's 'in connection with' language means 'able to pur-

sue a private right of action after *Blue Chip Stamps*,' . . . . [a]ll of these class actions must be dismissed." Pet. App. 6a. "As an effort to evade SLUSA," the court of appeals explained, "[petitioners'] class definition is a flop: some of the investors who held shares during the class period must have purchased their interest (or increased it) during that time; others, who owned shares at the beginning of the period, undoubtedly sold some or all of their investment during the window." *Ibid.* Indeed, because "[e]ach of the funds has substantial daily turnover," the court of appeals concluded that "the class of 'all holders' during even a single day contains many purchasers and sellers." *Ibid.* Thus, even if SLUSA incorporates a *Blue Chip Stamps*-type purchaser/seller limitation—that is, *even assuming the correctness of petitioners' construction of SLUSA*—the Seventh Circuit held that petitioners' state-law claims are precluded.

The Seventh Circuit recognized that securities plaintiffs could (and that one petitioner had attempted to) plead around petitioners' construction of SLUSA by "depicting the[] class[] as containing entirely non-traders." Pet. App. 8a. Because "*Blue Chip Stamps* would prevent such a private action from proceeding under Rule 10b-5," petitioners argued that SLUSA does not preclude such an action from proceeding under state law. *Id.* at 6a. The court of appeals disagreed.

The Seventh Circuit acknowledged that three Circuits—the Second (*Dabit*), Eighth (*Green*), and Eleventh (*Riley*)—had "equat[ed]" SLUSA's preclusive reach and the availability of a *private* right of action under Rule 10b-5. Pet. App. 7a. "The [N]inth [C]ircuit (*Falkowski*), by contrast, has written that coverage of SLUSA tracks the coverage of § 10(b) and Rule 10b-5 when enforced by *public* plaintiffs (the SEC or a criminal prosecutor)." *Ibid.* This view has also been articulated by the SEC, as *amicus curiae* in *Dabit*, both before the Second Circuit and in this Court.

"To say that SLUSA uses the same language as § 10(b) and Rule 10b-5," the court of appeals explained, "is pretty much to resolve the point." Pet. App. 7a. The public authorities may enforce the statute and regulation without prov-

ing that some governmental entity purchased or sold securities; "instead the 'in connection with' language ensures that the fraud occurs in securities transactions rather than some other activity." *Ibid.* (citing *SEC* v. *Zandford*, 535 U.S. 813 (2002), and *Superintendent of Ins.* v. *Bankers Life & Cas. Co.*, 404 U.S. 6 (1971)). "Decisions since *Blue Chip Stamps* reiterate that it deals with private actions alone and does not restrict coverage of the statute and regulation." *Id.* at 8a (citing *United States* v. *O'Hagan*, 521 U.S. 642 (1997); *Holmes* v. *SIPC*, 503 U.S. 258 (1992); and *United States* v. *Naftalin*, 441 U.S. 768 (1979)).

The court of appeals noted that "[i]t would be more than a little strange if the Supreme Court's decision [in *Blue Chip Stamps*] to block private litigation by non-traders became the opening by which that very litigation could be pursued under state law, despite the judgment of Congress (reflected in SLUSA) that securities class actions must proceed under federal securities law or not at all." Pet. App. 8a. SLUSA's "preemptive effect is not confined to knocking out state-law claims by investors who have *winning* federal claims, as [petitioners] suppose. It covers both good and bad securities claims—*especially* bad ones." Pet. App. 9a.

The court of appeals concluded that by attempting to limit their classes to exclude claims by purchasers and sellers of securities, "plaintiffs do not take their claims outside § 10(b) and Rule 10b-5; instead they demonstrate only that the claims must be left to public enforcement." Pet. App. 8a. Because the SEC could maintain an action based on the allegations in petitioners' complaints, the "in connection with" requirement is met and the claims are precluded by SLUSA. *Id.* at 8a-9a. "We hold that SLUSA is as broad as § 10(b) itself and that limitations on private rights of action to enforce § 10(b) and Rule 10b-5 do not open the door to litigation about securities transactions under state law." *Id.* at 9a.

DISCUSSION

Neither of the questions presented by petitioners warrants plenary review in this case.

Petitioners first question the propriety of the Seventh Circuit's acceptance of appellate jurisdiction. Although the decision below conflicts with decisions of the Second and Ninth Circuits, those decisions were rendered before this Court's decisions in *Kontrick* and *Scarborough*, on which the Seventh Circuit relied; the Second and Ninth Circuits could well reconsider their positions. Moreover, the jurisdictional issue is of diminished continuing importance, both because Congress has since made remand orders in non-securities class actions appealable (leaving securities actions subject to SLUSA) and because the Court's decision in *Dabit* will clarify the principal substantive issue that has led to confusion among the lower courts. And, in any event, the Seventh Circuit's jurisdictional decision is correct.

The second question presented by petitioners is the appropriate construction of SLUSA, specifically as regards so-called "holder" actions. The Court has agreed to provide such a construction in *Dabit*. Regardless of whether the Court affirms or reverses the Second Circuit in *Dabit*, this petition should be denied because the Seventh Circuit held that all petitioners allege misconduct in connection with their own purchases or sales of securities.

I. The Seventh Circuit's Exercise Of Appellate Jurisdiction Does Not Warrant Plenary Review

Respondents acknowledge that the decision below conflicts with the Second Circuit's decision in *Spielman* and the Ninth Circuit's decision in *Abada* (which was adhered to by the same court in *United Investors*). The Second and Ninth Circuits concluded that the remand of a case removed under SLUSA evidences a lack of subject matter jurisdiction in the federal courts within the meaning of 28 U.S.C. § 1447(c); the Seventh Circuit, by contrast, concluded that because Congress had expressly conferred jurisdiction on the federal courts to make a particular determination under SLUSA (*viz.*, whether the claim can proceed in any court), the district court's exercise of that jurisdiction in this case was reviewable on appeal. Notwithstanding the differing approaches

adopted by these courts, the jurisdictional issue does not warrant the Court's review at this time.

A. The Asserted Conflict Need Not Be Resolved At This Time

It is a commonplace that this Court does not grant certiorari to review *every* conflict among the courts of appeals. *See* Robert L. Stern et al., *Supreme Court Practice* § 4.4 at 226-28 (8th ed. 2002). Here, at least three factors militate against granting review of the jurisdictional question presented by petitioners.

1. Contrary to petitioners' contention (Pet. 21), there is no reason to believe that the Second and Ninth Circuits will not reconsider their position in light of the Seventh Circuit's decision. Neither court has examined the question since the decision below was announced, although the very existence of the decision below obviously gives litigants an incentive to raise the jurisdictional issue in future cases in the Second or Ninth Circuits. Those courts could well conclude that their earlier decisions were in error and that the Seventh Circuit's analysis is correct.

This is particularly so because, as the court below pointed out, the Second and Ninth Circuits relied on a reading of the term "jurisdiction" that is inconsistent with two later decisions of this Court—*Scarborough* and *Kontrick*. Although petitioners maintain that "there is no reason to expect *Scarborough* or *Kontrick* to affect the analysis of the Second and Ninth Circuits" (Pet. 21), the fact that these decisions clearly affected the analysis of not only the Seventh Circuit panel, but all the active judges of that court, gives every reason to expect that jurists on the Second and Ninth Circuits might similarly choose to give weight to this Court's pronouncements. *Cf. Disher* v. *Citigroup Global Mkts., Inc.*, 419 F.3d 649, 652 (7th Cir. 2005) (declining to revisit the jurisdictional issue).

Petitioners' principal rejoinder is that "the Eleventh Circuit determined that [SLUSA-based remand orders] are not reviewable after the Seventh Circuit had decided the oppo-

site." Pet. 21. But petitioners put more weight on *Williams* v. *AFC Enterprises, Inc.*, 389 F.3d 1185 (11th Cir. 2004), than it will bear. The state-court complaint in *Williams* alleged only violations of the Securities Act of 1933, and the Eleventh Circuit gave dispositive weight to pre-SLUSA circuit precedent holding that the 1933 Act's prohibition on removal (15 U.S.C. § 77v(a)) precluded appellate review of orders remanding claims brought under that statute. 389 F.3d at 1189-90 (relying on *Ariail Drug Co.* v. *Recomm Int'l Display*, 122 F.3d 930 (11th Cir. 1997), as "control[ling]" and "indistinguishable"). The Eleventh Circuit did not cite, or follow, the Second or Ninth Circuit decisions on which petitioners rely. Nor did the Eleventh Circuit cite the decision below, much less disagree with it. Petitioners thus wildly misstate the case when they claim that *Williams* "rejected the approach adopted by the Seventh Circuit and . . . agreed with the Second and Ninth Circuits." Pet. 2.[4]

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[4] In fact, *Williams* is entirely consistent with the decision below. In *Williams*, the state-court complaint asserted violations of *federal* law, but SLUSA preempts only class actions "based upon the statutory or common law of any State or subdivision thereof." 15 U.S.C. §§ 77p(b) & 78bb(f)(1). Since the complaint on its face did not present even a colorable SLUSA defense, the district court never had jurisdiction to adjudicate the federal issue. This conclusion was presaged by the decision below, where the Seventh Circuit reasoned that "[a] conclusion that a suit is not a 'covered class action' (say, because just 40 investors stand to recover damages [rather than the 50 or more required by SLUSA]) would imply that removal had been improper, and such a decision would come within § 1447(d)." Pet. App. 14a. By contrast, where a removing defendant presents a colorable defense under SLUSA—as respondents did here—the district court has jurisdiction to adjudicate that defense and its decision on the federal issue is subject to appellate review. *Ibid.* Nothing in *Williams* is to the contrary.

2. As petitioners acknowledge (Pet. 22 n.11), Congress recently made orders remanding most class actions to state court appealable. Section 5(a) of the Class Action Fairness Act of 2005 (CAFA) provides that "notwithstanding section 1447(d), a court of appeals may accept an appeal from an order of a district court granting or denying a motion to remand a class action to the State court from which it was removed." 119 Stat. 12 (codified at 28 U.S.C. § 1453(c)(1)). CAFA does not apply to securities actions, which remain subject to SLUSA.

Petitioners contend that "questions about the proper interpretation of SLUSA's preemption and removal provisions are no less important after passage of CAFA." Pet. 22 n.11. But whereas before CAFA petitioners might have made an argument that the decision below could lead to widespread appeals of remand orders, Congress has now legislated precisely that result. The court of appeals' decision to accept jurisdiction in this case therefore potentially affects only a fraction of all class action litigation in the federal courts, and it does so in a way that is entirely consistent with Congress's latest pronouncement on the subject. This significantly lessens the importance of the conflict asserted by petitioners. Moreover, Congress's willingness to legislate in this area, as evidenced most recently by CAFA, provides an alternative avenue of relief for those who disagree with the Seventh Circuit's construction of SLUSA.

3. In light of the foregoing considerations, the jurisdictional issue presented by petitioners would benefit from further percolation in the lower courts before being addressed, if necessary, by this Court. *See, e.g.*, *McCray* v. *New York*, 461 U.S. 961, 963 (1983) (Stevens, J.) (certiorari denied where issue requires "further study" in lower courts "before it is addressed by this Court"); *cf. Rowinski* v. *Salomon Smith Barney Inc.*, 398 F.3d 294, 298 n.2 (3d Cir. 2005) (noting the jurisdictional issue without weighing in on it).

Affording the lower courts the opportunity to grapple in the first instance with the appealability of SLUSA-related orders is especially appropriate because *Dabit* presents this

Court with its first occasion to authoritatively construe SLUSA since it was enacted in 1998. As petitioners point out, the jurisdictional issue could arise "in the entire range of cases in which plaintiffs successfully contest the applicability of SLUSA's preemption provision." Pet. 21. In *Dabit*, this Court will decide just what that "range of cases" encompasses. And once the Court has articulated the scope of SLUSA's preclusive reach, it is reasonable to expect another round of litigation in the lower federal courts. The *Dabit* decision, and any such follow-on litigation, could definitively resolve the jurisdictional question one way or the other.

If, for example, the *Dabit* Court were to adopt some variant of the Second Circuit's approach to SLUSA preclusion, securities plaintiffs would have further incentive to file in state court, which would lead to more removals and, presumably, additional attempts to appeal during which the asserted conflict would either be exacerbated or resolved. By contrast, if the *Dabit* Court were to agree with the Seventh Circuit that the *Blue Chip Stamps* purchaser/seller limitation is inapplicable to SLUSA, then most state-law class actions pertaining to securities would be preempted (as, we believe, Congress intended them to be) and the jurisdictional issue would be all but moot. To the extent the jurisdictional issue retains any practical significance following *Dabit*, there will be ample time, and opportunity, for the lower courts to resolve it in due course.[5]

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[5] Indeed, plenary review of the jurisdictional issue in this case could well be an exercise in futility. If petitioners were to prevail on the jurisdictional issue, this case would presumably be remanded; but on remand, respondents would move to dismiss under SLUSA (as construed in *Dabit*). Because the Seventh Circuit has already ruled that all petitioners' "claims depend on statements made or omitted in connection with *their own* purchases of the funds' securities" (Pet. App. 9a), petitioners' claims are precluded by SLUSA *regardless* of whether the Court affirms or reverses in *Dabit*.

[Footnote continued on next page]

B. The Decision Below Is Correct

Petitioners maintain that "[a] court's remand order based on a finding of no preemption [under SLUSA] is, for purposes of § 1447(d), no different from any other remand order based on a lack of federal-question jurisdiction following a defendant's removal of a case." Pet. 20. Petitioners are simply incorrect in equating a district court's adjudication of the SLUSA preclusion defense with an ordinary determination that a court lacks subject-matter jurisdiction. This is the fundamental point overlooked by the Second and Ninth Circuits, as the court below explained. Pet. App. 16a.

SLUSA's express removal provisions confer jurisdiction on the federal courts to adjudicate a discrete question of federal law (*i.e.*, whether the claims at issue can be maintained in any court). 15 U.S.C. §§ 77p(c) & 78bb(f)(2). "The express removal provisions of SLUSA are clearly sufficient to confer Article III 'arising under' jurisdiction." *Dudek* v. *Prudential Secs., Inc.*, 295 F.3d 875, 879 n.3 (8th Cir. 2002) (citing *Verlinden B.V.* v. *Central Bank of Nig.*, 461 U.S. 480, 494-97 (1983)). And it is well-established that Article III "'arising under' jurisdiction is broader than federal-question jurisdiction under § 1331." *Verlinden*, 461 U.S. at 495. In particular, "Congress may confer on the federal courts jurisdiction over any case or controversy that might call for the application of federal law" (*id.* at 492), including claims that involve only a federal defense. *Osborn* v. *Bank of United States*, 22 U.S. (9 Wheat.) 738, 822 (1824) (it is "a sufficient

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[Footnote continued from previous page]

See Part II.A., *infra*. Accordingly, the complaints in this case will be dismissed regardless of the outcome in *Dabit*—which is precisely the effect of the extant judgment of the court below. Because petitioners' situation would not change even if they could win on the jurisdictional question, there is no cause for this Court to answer it here.

foundation for jurisdiction, that the title or right set up by the party, may be defeated by one construction of the constitution or law of the United States, and sustained by the opposite construction"). That is precisely what Congress did in SLUSA. Pet. App. 15a ("The district judge made a substantive decision under authority granted by a federal statute").

SLUSA is not the first time that "Congress has expressly provided by statute for removal when it desired federal courts to adjudicate defenses based on federal [law]." *Oklahoma Tax Comm'n* v. *Graham*, 489 U.S. 838, 841 (1989). Under the federal officer removal statute (28 U.S.C. § 1442), for example, "suits against federal officers may be removed despite the nonfederal cast of the complaint; the federal question element is met if the defense depends on federal law." *Jefferson County* v. *Acker*, 527 U.S. 423, 431 (1999). The statute provides that a suit against a federal officer may be removed to federal court if it involves "any act under color of such office" (28 U.S.C. § 1442(a)(1)), and has long been understood to authorize removal whenever the officer has a colorable defense (*i.e.*, that the challenged act was official)—not only when the court finds that the act *meets* the statutory requirement. "The officer need not win his case before he can have it removed." *Willingham* v. *Morgan*, 395 U.S. 402, 407 (1969). Rather, "[o]nce the federal defendant has a plausible federal defense, removal is appropriate so that the federal court may determine whether the defense succeeds." *Venezia* v. *Robinson*, 16 F.3d 209, 212 (7th Cir. 1994).

Petitioners insist, however, that because SLUSA's removal provision "cross-references" its preemption provision (*see* 15 U.S.C. § 78bb(f)(2)), Congress intended to authorize removal only of those cases that are actually preempted—that is, the defendant must win its case in order to remove it. Pet. 18; *see id.* at 11 (arguing that "only those actions preempted by SLUSA are subject to [removal]"). This Court rejected a strikingly similar argument in *Acker*, where it explained that "demanding an airtight case on the merits" in order to support removal "would defeat the purpose of the [federal officer] removal statute," which is to have the *federal* defense

adjudicated in *federal* court. 527 U.S. at 432 (citing *Willingham*, 395 U.S. at 407); *see also id.* at 447-48 (Scalia, J., dissenting). SLUSA similarly was intended to have the federal courts resolve the federal preclusion question, so long as the SLUSA defense is colorable. *Cf.* note 4, *supra*.

It follows that petitioners' argument that § 1447(d) precludes appellate review of an order adjudicating a colorable defense of SLUSA preclusion is quite wrong. "That the federal court ultimately rejects the federal defense that supported removal under [the federal officer statute] does not mean that it thereby loses subject matter jurisdiction over the removed action; the jurisdiction of the federal courts over a properly removed action will not be defeated by later developments in the suit." *Jamison* v. *Wiley*, 14 F.3d 222, 239 (4th Cir. 1994) (internal quotation omitted); *see also Gutierrez de Martinez* v. *Lamagno*, 515 U.S. 417, 434-35 (1995) (plurality opinion). The same analysis applies to SLUSA removals. The court of appeals held that "[t]his suit was properly removed." Pet. App. 15a.[6] It follows that the district court's subsequent rejection of respondents' defense of preclusion under SLUSA did not divest the court of jurisdiction, but rather constituted the exercise of jurisdiction. *Bell*, 327 U.S. at 682. The court below properly accepted appellate jurisdiction to review the district court's adjudication of the defense that Congress invested the federal courts with the authority to resolve.[7]

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[6] Although petitioners take issue with this case-specific conclusion (Pet. 18), it is clearly correct: Respondents had a colorable basis for invoking the jurisdiction of the federal court to decide their SLUSA defense, as the Seventh Circuit's subsequent decision dismissing petitioners' claims conclusively establishes. Pet. App. 9a.

[7] Indeed, this Court recognized long ago that a substantive decision that precedes, and even necessitates, a remand to state court is reviewable on appeal. *Waco* v. *United States Fid. & Guar. Co.*, 293 U.S. 140 (1934).

II. The Seventh Circuit's Construction Of SLUSA Does Not Warrant Plenary Review

The second question presented by petitioners essentially asks whether, as the court below concluded, "SLUSA is as broad as § 10(b) itself" (Pet. App. 9a), or rather, as petitioners contend, the purchaser/seller limitation devised by the Court in *Blue Chip Stamps* in the context of private Rule 10b-5 actions also serves to limit the preclusive reach of SLUSA. The Court will decide that precise question in *Dabit*. But because petitioners' claims are precluded by SLUSA under *either* construction, this petition should be denied.

A. The Asserted Conflict Will Be Resolved In *Dabit*

Dabit, like the decision below, held that the "meaning of 'in connection with' under SLUSA is coterminous with the meaning of the nearly identical language in § 10(b) of the Securities Exchange Act of 1934 . . . and its corresponding Rule 10b-5." 395 F.3d at 28. *Dabit* also held, consistent with the decision below, that the *Blue Chip Stamps* "limitation on standing to bring a private suit for damages for fraud in connection with the purchase or sale of securities [under Rule 10b-5] is unquestionably a distinct concept from the general statutory and regulatory prohibition on fraud in connection with the purchase or sale of securities [under § 10(b) and Rule 10b-5]." *Id.* at 39. *Dabit* recognized, for example, that the "the SEC or the United States may bring an enforcement action under [these provisions] so long as *someone* buys or sells the security during the period of allegedly fraudulent conduct." *Id.* at 37 (quotations omitted; emphasis added).

The Second Circuit in *Dabit*, however, proceeded from these correct, and universally accepted, premises to the *non sequitur*, and erroneous, conclusion that "the purchaser-seller rule of *Blue Chip Stamps* . . . applies as a limit on SLUSA's 'in connection with' requirement such that SLUSA does not preempt claims that do not allege purchases or sales made by

the plaintiff or the alleged class members." *Id.* at 28. The Seventh Circuit, by contrast, correctly concluded in the decision below "that SLUSA is as broad as § 10(b) itself and that limitations on private rights of action to enforce § 10(b) and Rule 10b-5 do not open the door to litigation about securities transactions under state law." Pet. App. 9a.

This Court has already granted certiorari in *Dabit* to resolve the asserted conflict between the Second and Seventh Circuits. As framed in the *Dabit* petition (at i), the question presented is:

> Whether, as the Seventh Circuit held earlier this month and in direct conflict with the decision below, SLUSA preempts state law class action claims based upon allegedly fraudulent statements or omissions brought solely on behalf of persons who were induced thereby to hold or retain (and not purchase or sell) securities?

The Court's resolution of this question in *Dabit* will necessarily answer the second question presented by petitioners here—*viz.*, whether "SLUSA preempts claims brought by holders of securities." Pet. i.

Petitioners do not contend that their second question warrants plenary review independently of—or even concurrently with—the Court's consideration of *Dabit*. To the contrary, they argue only that the Court should "hold the petition pending resolution of *Dabit*." Pet. 30. Respondents agree that this petition should be held pending *Dabit*. Once *Dabit* is decided, however, this petition should be denied.

This petition should plainly be denied if the Court were to reverse the Second Circuit's decision in *Dabit* and agree with the Seventh Circuit that the *Blue Chip Stamps* purchaser/seller standing limitation on private rights of action does not limit the preclusive reach of SLUSA. Petitioners' allegations meet the statutory "in connection with" require-

ment as elucidated in cases such as *Zandford*, and petitioners do not even attempt to argue otherwise.[8]

If the Court were to affirm the Second Circuit's decision in *Dabit*, then this petition should also be denied. The Seventh Circuit ruled that petitioners' claims are precluded *even under* the construction of SLUSA advanced by the respondent in *Dabit*—*i.e.*, even applying the purchaser/seller limitation to limit the scope of SLUSA preclusion. Pet. App. 6a. Although petitioners profess to "believe that this ruling is incorrect" (Pet. 12 n.9), they have not even asked this Court to review this fact-bound ruling, which clearly does not warrant plenary consideration. It is dispositive as to all of the complaints but one. Petitioners seek solace in the fact that one complaint "defined a class of holders without claims under Rule 10b-5" (*ibid.*), ignoring the Seventh Circuit's subsequent ruling that *all* petitioners' "claims depend on statements made or omitted in connection with *their own* purchases of the funds' securities." *Id.* at 9a. This ruling, which petitioners do not challenge, brings the case within SLUSA's preclusive scope even under the construction advanced by the respondent in *Dabit*. Accordingly, this petition should be denied regardless of whether the Second Circuit's decision in *Dabit* is affirmed or reversed.[9]

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[8] Petitioners' suggestion that they have not alleged the kind of misconduct addressed by SLUSA (Pet. 30) is not encompassed by petitioners' second question, and thus is not properly presented. *See, e.g.*, *Izumi Seimitsu Kogyo Kabushiki Kaisha* v. *United States Philips Corp.*, 510 U.S. 27, 34 (1993). Moreover, because it was not presented to or passed on by the court of appeals (Pet. App. 6a), this Court should decline to consider it. *See, e.g.*, *Taylor* v. *Freeland & Kronz*, 503 U.S. 638, 646 (1992).

[9] In the event the Court has any question as to the applicability of its decision in *Dabit* to the facts here, then the appropriate course would be to grant the petition, vacate the

[Footnote continued on next page]

B. The Decision Below Is Correct

Because the Seventh Circuit ruled that all petitioners' "claims depend on statements made or omitted in connection with *their own* purchases of the funds' securities" (Pet. App. 9a), the complaints in this case must be dismissed even under the construction of SLUSA advanced by the respondent in *Dabit*. This case therefore does not present an appropriate vehicle for determining whether some other action, in which the class members' claims do not depend on allegations of misconduct in connection with their own purchases or sales of securities, might be precluded.

Moreover, the Seventh Circuit's conclusion that the *Blue Chip Stamps* purchaser/seller standing limitation does not limit the scope of SLUSA preclusion is correct. Petitioners maintain that it is wrong because "the purchaser-seller rule is . . . an interpretation of the 'in connection with' phrase." Pet. 28. But as Justice O'Connor succinctly put it, "[t]he purchaser/seller standing limitation in Rule 10b-5 damages actions . . . does not stem from a construction of the phrase 'in connection with the purchase or sale of any security.'" *Holmes*, 503 U.S. at 284 (concurring opinion). Petitioners' contrary argument simply cannot be reconciled with *O'Hagan* (decided the year before SLUSA's enactment) or *Zandford*, which make clear that the purchaser/seller limitation does *not* apply to criminal prosecutions or administrative enforcement actions under § 10(b), as to which the "in connection with" requirement remains an element of the offense on which the government bears the burden of proof. *See O'Hagan*, 521 U.S. at 665 (*Blue Chip Stamps* "is 'inapplicable' to indictments for violations of § 10(b) and Rule 10b-5"). SLUSA's preclusive reach is, as Judge Easterbrook cor-

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decision below, and remand for further proceedings in the court of appeals consistent with *Dabit*.

rectly recognized in the decision below, "as broad as § 10(b) itself" (Pet. App. 9a); and it is certainly broad enough to preclude petitioners' claims.[10]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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November 29, 2005.

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[10] The correctness of the decision below is further demonstrated in the briefs filed by the petitioner, and the *amici curiae* supporting petitioner, in *Dabit*.

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APPENDIX

IN THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

Cause No. 03-692

ROBERT POTTER and DOROTHY LEUTTINGER, individually and on behalf of all others situated,

Plaintiffs,

vs.

JANUS INVESTMENT FUND, a business trust, JANUS CAPITAL MANAGEMENT, LLC, SCUDDER INTERNATIONAL FUND, INC. a corporation and DEUTSCHE INVESTMENT MANAGEMENT AMERICAS, INC.,

Defendants.

[Filed September 16, 2003]

COMPLAINT

COME NOW Plaintiffs, ROBERT POTTER and DOROTHY LEUTTINGER, individually and on behalf of all others similarly situated, by and through their undersigned counsel, and for their complaint against Defendants, JANUS INVESTMENT FUND, JANUS CAPITAL MANAGEMENT, LLC, SCUDDER INTERNATIONAL FUND, INC., and DEUTSCHE INVESTMENT MANAGEMENT AMERICAS, INC., state as follows:

1. Plaintiff ROBERT POTTER is a resident of Edwardsville, Madison County, Illinois.

2. Plaintiff DOROTHY LEUTTINGER is a resident of Trenton, Clinton County, Illinois.

3. Defendant JANUS INVESTMENT FUND ("Janus Funds") is a Massachusetts business trust with its principal place of business in Denver, Colorado. Janus Funds is the sponsor of the Janus Overseas Fund ("Janus Overseas"). Defendant Janus Funds does business in the state of Illinois and is registered as a mutual fund in the state of Illinois. Defendant Janus Funds has consented to the jurisdiction of Illinois courts. Defendant JANUS FUNDS at all times relevant herein has promoted, marketed, and sold shares to the investing public nationwide including the state of Illinois. Defendant JANUS FUNDS maintains investor relationships nationwide including with shareholders in the state of Illinois. Defendant JANUS FUNDS has significant contacts with Madison County and the activities complained of herein occurred, in whole or part, in Madison County, Illinois.

4. Defendant JANUS CAPITAL MANAGMENT LLC ("JANUS FUNDS MANAGER") is a Delaware limited liability company with its principal place of business in Denver, Colorado. The day-to-day tasks associated with running the business of Janus Oversees Fund, such as investment management, share marketing, distribution, redemption, financial and regulatory reporting, and custodianship of fluids are contracted out since it has no significant number of internal employees. Defendant JANUS FUNDS MANAGER has been contracted to serve as the investment manager for the Janus Overseas Fund. As the investment manager for Janus Overseas Fund, Defendant JANUS FUNDS MANAGER selects the fund's investments and operates or supervises most phases of the fund's business including the valuing of the fund's portfolio securities and the fund net asset value. Defendant JANUS FUNDS MANAGER has significant contacts with fund shareholders in Madison County as a result of its operation and supervision of Janus Overseas Fund business and the activities complained of herein occurred, in whole or in part, in Madison County, Illinois. Defendant JANUS FUNDS MANAGER utilizes an interactive website to

communicate with fund shareholders, including those in Madison County, Illinois, regarding the performance of the Fund and the investments it manages.

5. Defendant SCUDDER INTERNATIONAL FUND, INC. ("SCUDDER FUNDS") is a Maryland corporation with its principal place of business in New York, New York. SCUDDER FUNDS is the sponsor of the Scudder International Fund ("Scudder International"). Defendant SCUDDER FUNDS does business in the state of Illinois and is registered as a mutual fund in the state of Illinois. Defendant SCUDDER FUNDS has consented to the jurisdiction of Illinois courts. Defendant SCUDDER FUNDS at all times relevant herein has promoted, marketed, and sold shares to the investing public nationwide including the state of Illinois. Defendant SCUDDER FUNDS maintains investor relationships nationwide including with shareholders in the state of Illinois. Defendant SCUDDER FUNDS has significant contacts with Madison County, and the activities complained of herein occurred, in whole or part, in Madison County, Illinois.

6. Defendant DEUTSCHE INVESTMENT MANAGEMENT AMERICAS, INC. ("SCUDDER FUND MANAGER") is a Delaware corporation with its principal place of business inNew York, New York. The day-to-day tasks associated with running the business of Scudder International, such as investment management, share marketing, distribution, redemption, financial and regulatory reporting, and custodianship of funds, are contracted out since it has no significant number of internal employees. Defendant SCUDDER FUND MANAGER has been contracted to serve as the investment manager for Scudder International. As the investment manager for Scudder International, Defendant SCUDDER FUND MANAGER selects the fund's investments and operates or supervises most phases of the fund's business including the valuing of the fund's portfolio securities and the fund net asset value. Defendant SCUDDER FUND MANAGER has significant contacts with fund shareholders in Madison County as a result of its operation and supervision of Scudder International business and the activities complained of herein occurred, in whole or

in part, in Madison County, Illinois. Defendant SCUDDER FUND MANAGER utilizes an interactive website to communicate with fund shareholders, including those in Madison County, Illinois regarding the performance of the Fund and the investments it manages.

7. At all tunes relevant herein, Plaintiff ROBERT POTTER has owned and held shares of Janus Overseas for the purpose of long term investing in international securities.

8. At all times relevant herein, Plaintiff DOROTHY LEUTTINGER has owned and held shares of Scudder International for the purpose of long term investing in international securities.

9. This Court has jurisdiction over the subject matter and the parties pursuant to 735 ILCS 5/2-209.

10. Venue is proper in this Court pursuant to 735 ILCS 5/2-101.

11. The foreign securities purchased by Defendants' Funds for their portfolios are principally traded in securities markets outside of the United States.

12. Open end mutual funds such as Defendants' Funds have been tremendously successful in convincing investors such as Plaintiffs' to hold their fund shares by urging investors to invest for the long term and by effectively marketing the various advantages of long term ownership of funds over direct investment including professional management, diversification, and liquidity.

13. Shares of open end mutual funds are sold to investors such as Plaintiffs at a price based upon the net asset value ("NAV") per share plus applicable sales charges. Investors in shares may redeem their shares at the NAV of the shares less any redemption charges.

14. The share prices (NAV) of Defendants' mutual funds are set by deducting the fund liabilities from the total assets of the portfolio and then dividing by the number of outstanding shares.

15. Because the sales and redemption prices are based upon NAV,which in turn depends upon the fluctuating value of the fund's underlying portfolio of securities, Defendants recalculate the fund net asset value every business day. Defendants set the fund share price (NAV) once every business day at the close of trading on the New York Stock Exchange at 4:00 p.m. Eastern Time. The NAV of the shares is reported by Defendants to the National Association of Securities Dealers (NASD) for public distribution.

16. In valuing its underlying assets for purposes of setting the NAV, Defendants use the last trade price in the home market of each of the securities in its portfolio. A significant portion of the securities in the Defendants' portfolios are foreign securities, The home markets for such foreign securities include London, Paris, Frankfurt, Moscow, Singapore, Kuala Lumpur, Hong Kong, Taipei, Tokyo and Sydney. These markets are located in time zones that are five hours to fifteen hours ahead of Eastern Standard Time.

17. Studies of world financial markets have established associations between the value changes among various markets. There is a positive correlation between value movements in the United States market and value movements in foreign markets. If the United States market experiences an upward movement in values, it can be predicted that Asian markets will move upward once trading begins their next day. The same upward movement can be predicted for European markets once trading begins their next day. Similarly, if the United States market experiences a downward movement in values, it can be predicted that Asian and Europe markets will move downward once trading begins their next day. Because of these positive correlations, the closing prices of the foreign securities in the underlying portfolio may not reflect current market values at the time Defendants set their fund NAV. Appropriate adjustments need to be made to the closing prices of the foreign securities in order to reflect current market values. Despite knowledge of the United States market result, the positive correlation and the stale price of the foreign securities in its underlying

portfolio. Defendants do not make any value adjustment to the portfolio's foreign securities prior to calculating fund NAV and setting share price every business day.

18. The positive correlation between the upward or downward movement of value in the United States market and subsequent movements in foreign markets around the world is between 0.7 and 0.8. A value of 0.0 equates to absolutely no correlation between value movements in United States markets and subsequent movements in foreign markets. A value of 1.0 equates to an absolute correlation between value movements in United States markets and subsequent value movements in foreign markets.

19. Studies of world financial markets demonstrate that the greater the percentage increase or decrease in the value of United States markets, the more likely foreign markets will post corresponding value movements on subsequent days. The probability that the value movements of foreign markets will follow the previous day's value movements in United States markets is directly correlated with the degree or extent of the value movement of United States markets.

20. Since many of the home markets for the foreign securities in the Defendants' asset portfolio last traded hours before the setting at 4:00 p.m. Eastern of the fund NAV, the closing prices used to calculate the NAV of Defendants' funds are stale and do not reflect price relevant information available subsequent to the foreign security's last trade that will affect the value of such security.

21. During the interval that elapses between the time that Defendants got their share NAV (and release it to the NASD for communication to the public) on consecutive days, the securities markets in Australia, Japan, Taiwan, Hong Kong, Malaysia, Singapore, Russia, Germany, France and the United Kingdom have traded for an entire session from open to close.

22. The exchange located in Sydney, Australia observes normal market trading hours of 10:00 a.m to 4:00 p.m. local time. Active trading of securities traded on this exchange

ends, and closing prices for those securities are posted, at 4:00 p.m local time (2:00 a.m. Eastern time). When Defendants calculate their fund NAV using closing prices from this exchange, Defendants rely upon closing prices for securities traded on this exchange that have been static for 14 hours.

23. The exchange located in Tokyo, Japan observes normal trading hours of 9:00 a m. to 3.00 p.m. local time. Active trading of securities traded un this exchange ends, and closing prices for those securities are posted, at 3:00 p.m. local time (2:00 a.m. Eastern time). When Defendants calculate their fund NAV using closing prices from this exchange, Defendants rely upon closing prices for securities traded on this exchange that have been static for 14 hours.

24. The exchange located in Taipei, Taiwan observes normal trading hours of 9:00 a.m. to 1:30 p.m. local time. Active trading of securities traded on this exchange ends, and closing prices for those securities are posted, at 1:30 p.m. local time (1:30 a.m. Eastern time). When Defendants calculate their fund NAV using closing prices from this exchange, Defendants rely upon closing prices for securities traded on this exchange that have been static for 14.5 hours.

25. The exchange located in Hong Kong observes normal trading hours of 10:00 a.m. to 4:00 p.m. local time. Active trading of securities traded on this exchange ends, and closing prices for those securities are posted, at 4:00 p.m. local time (4:00 a.m. Eastern time). When Defendants calculate its fund NAV using closing prices from this exchange, Defendants rely upon closing prices for securities traded on this exchange that have been static for 12 hours.

26. The exchange located in Kuala Lumpur, Malaysia observes normal trading hours of 9:30 a.m. to 5:00 p.m. local time. Active trading of securities traded on this exchange ends, and closing prices for those securities are posted, at 5:00 p.m. local time (5:00 a.m. Eastern time). When Defendants calculate their fund NAV using closing prices from this exchange, Defendants rely upon closing prices for

securities traded on this exchange that have been static for 11 hours.

27. The exchange located in Singapore observes normal trading hours of 9:00 a.m. to 5:00 p.m. local tune. Active trading of securities traded on this exchange ends, and closing prices for those securities are posted, at 5:00 p.m. local time (5:00 a.m. Eastern time). When Defendants calculate their fund NAV using closing prices from this exchange, Defendants rely upon closing prices for securities traded on this exchange that have been static for 11 hours.

28. The exchange located in Moscow, Russia observes normal trading hours of 12:00 p.m to 7:00 p.m. local time. Active trading of securities traded on this exchange ends, and closing prices for those securities are posted, at 7:00 p.m. local time (11:00 a.m. Eastern time). When Defendants calculate their fund NAV, using closing prices from this exchange, Defendants rely upon closing prices for securities traded on this exchange that have been static for 5 hours.

29. The exchange located in Frankfurt, Germany observes normal trading hours of 9:00 a.m. to 8:00 p.m., local time. Active trading of securities traded on this exchange ends, and closing prices for those securities are posted, at 8:00 p.m. local time (2:00 p.m. Eastern time). When Defendants calculate their fund NAV using closing prices from this exchange, Defendants rely upon closing prices for securities traded on this exchange that have been static for 2 hours.

30. The exchange located in Paris, France observes normal trading hours of 9:00 a.m. to 5:30 p.m. local time. Active trading of securities traded on this exchange ends, and closing prices for those securities are posted at, 5:30 p.m. local time (11:30 a.m. Eastern time). When Defendants calculate their fund NAV, using closing prices from this exchange Defendants rely upon closing prices for securities traded on this exchange that have been static for 4.5 hours.

31. The exchange located in London, England observes normal market hours of 8:00 a.m. to 4:30 p.m. local time.

Active trading of securities traded on this exchange ends, and closing prices for those securities are posted at 4:30 p.m. local time (11:30 a.m. Eastern time). When Defendants calculate their fund NAV using closing prices from this exchange, Defendants rely upon closing prices for securities traded on this exchange that have been static for 4.5 hours.

32. A significant portion of the underlying foreign securities in the Defendants' portfolios are listed on foreign exchanges and trade during each market's respective session. The NAVs set by Defendants do not take into account on a daily basis any price relevant information that has become available in this two to fourteen and one/half hour interval, after the final prices for the underlying foreign securities have been posted but, prior to the setting of the NAVs. Such price relevant information impacts the valuation of these underlying foreign securities and is significant for valuation because the final market prices have become stale and do not reflect the current market value of the securities.

33. By failing to make its daily adjustments based upon positive correlations between upward or downward movements in United States and foreign markets and by choosing to use stale prices in valuing their fund shares and setting their daily NAVs, Defendants have exposed long term shareholders to market timing traders who regularly purchase and redeem Defendants' shares as part of a profitable trading strategy. The market timing trading strategy stems from the ability of market timing traders to predict changes in the NAV. Market timing traders are able to predict changes in the NAV because of the positive correlation between value movements in United States markets and foreign markets. The stale price strategy of market timers who trade Defendants' shares is to buy shares on days when the United States market moves up and to sell (redeem) shares when the United States market moves down. In order to derive maximum benefit from price relevant information developed subsequent to the now stale closing prices of the portfolio securities, market timers wait until the fund deadline for buying or selling (redeeming) shares in Defendants' funds on

any particular business day. Because Defendants cannot buy or sell the foreign securities in the funds' underlying portfolio (due to the time difference between New York and the home markets of the foreign securit. s) at the time it sets the daily NAV that values the shares it issues and redeems, the shares that Defendants issue to and redeem from market timers do not reflect current market prices of the foreign securities held by the fund.

34. Due to the use of stale prices by Defendants in valuing the fund shares, market timers who buy Defendants' funds' shares on days when the United States market moves up are buying discounted shares at the expense of other fund shareholders because the funds underlying foreign securities assets are undervalued as of the time of the share purchase.

35. Due to the use of stale prices by Defendants in valuing their fund shares, market timers who sell (redeem) Defendants' shares on days when the United States market moves down are selling (redeeming) shares at a premium at the expense of other fund shareholders because the underlying foreign securities assets are overvalued as of the time of the share sale (redemption).

36. Shares in Defendants' funds can be traded, either by purchase or redemption, only once a day at 4:00 p.m. Eastern Time.

37. The excess profits that are obtained by market timing traders' taking advantage of the stale pricing of Defendants' shares come at the expense of fellow shareholders who are non-trading long term buy and hold investors. The transfer of wealth from the non-trading long term buy and hold shareholders to the market timers trading Defendants shares in Defendants' funds occurs through dilution.

38. Market timing traders pay cash to Defendants funds when they purchase discounted shares. Market timing traders receive cash from Defendants funds when they sell (redeem) their shares at a premium. Defendants' fund NAV is diluted in both instances. When market timing traders are

able to buy shares at a discount, Defendants' fund assets suffer dilution because the cash received by the fund for the shares purchased is less than the per share value of the underlying foreign securities because of the stale pricing utilized by Defendents. Likewise, when market timing traders are able to sell (redeem) shares at a premium, Defendants' fund assets suffer dilution because the cash paid out by the fund for the shares redeemed is more than the per share value of the underlying securities, again due to the stale pricing utilized by Defendants. In both instances, when Defendants receive less cash when issuing and pay out more cash when redeeming market timing trader shares than supported by the value of their underlying foreign securities, the result is a dilution of Defendants' cash. Since the cash held by the fund is one of the assets that is valued in setting the Defendant's daily fund NAV, it follows that the diluted fund cash position causes the fund NAV to be diluted as well. Due to the stale pricing utilized by Defendants, long term buy and hold shareholders have incurred a dilution in the NAV of their shares and the wealth represented by that diluted amount has been transferred to market timing traders.

39. By failing to make daily adjustments based upon positive correlations between upward movements in United States and foreign markets and by choosing to use stale prices in valuing the underlying foreign securities that are used setting their daily NAV, Defendants give market timing traders the opportunity to earn vastly higher returns at no additional risk. Unlike other market timing based trading, market timers who trade Defendants shares do not have to look into the future to time their purchases and redemptions of shares, rather, they have the luxury of being able to look backwards because, Defendants' share pricing fails to adjust for recognized positive correlations and uses stale prices in valuing its underlying portfolio securities.

40. Since it is such an attractive low risk trading vehicle to market timers, Defendants' funds experience increased trading and transaction costs, disruption of planned investment strategies, forced and unplanned portfolio

turnover including the liquidation of investments to meet market timer redemption requests, lost opportunity costs and asset swings that negatively impact fund operations and performance and the ability of the fund to provide a maximized return to long term shareholders.

41. Plaintiffs bring this complaint as a class action against Defendants JANUS FUNDS, JANUS FUNDS MANAGER, SCUDDER FUNDS and SCUDDER FUNDS MANAGER, and pursuant to § 5/2-801 et. seq., of the Illinois Code of Civil Procedure individually and on behalf of a class of all persons in the United States who have owned shares in Janus Overseas or Scudder International for more than fourteen days from the date of purchase to the date of sale (redemption) or exchange ("long term shareholders"). The class period commences five years prior to the filing of this complaint. Excluded from the class are Defendants, any parent, subsidiary, affiliate, or controlled person of Defendants, as well as the officers, directors, agents, servants or employees of Defendants, and the immediate family member of any such person. Also excluded is any judge who may preside over this case.

42. Plaintiffs are members of the class and will fairly and adequately assert and protect the interests of the class. The interests of the Plaintiffs are coincident with, and not antagonistic to, those of other members of the class. Plaintiffs have retained attorneys who are experienced in class action litigation.

43. Members of the class are so numerous that joinder of all members is impracticable.

44. Common questions of law or fact predominate over any questions affecting only individual members of the Class. Common questions include, but are not limited to, the following:

i. whether defendants failed to properly evaluate on a daily basis whether a significant event affecting the value of Janus Overseas and Scudder International's and portfolio of securities had

occurred after the foreign home markets for such securities had closed but before the fund's NAV calculation and share price setting;

ii. whether defendants failed to properly implement laws Overseas and Scudder International's portfolios valuation and share pricing policies and procedures making daily adjustments based upon United States market results and recognized positive correlations between upward movements in United States and foreign markets in the valuation of the fund's portfolio securities prior to the calculation of the fund NAV and setting of the share price;

iii. whether defendants failed to properly implement Janus Overseas and Scudder International's portfolio valuation and share pricing policies and procedures making daily adjustments to stale closing prices of the underlying portfolio securities before the fund's NAV calculation and share price setting;

iv. whether defendants failed to properly implement Janus Overseas and Scudder International's portfolio valuation and share pricing policies so as to require the use of fair value pricing on a daily basis to value portfolio securities and fund NAV and share prices when closing prices of portfolio securities did not reflect their market values;

v. whether Defendants failed to protect Janus Overseas and Scudder International's long term shareholders from market timing traders of fluid shares who use Janus Overseas and Scudder International's shares as a trading vehicle to earn profits at the expense of long term shareholders because of the failure of Janus Funds, Janus Funds Manager, Scudder Funds, and Scudder Fund Manager to make daily adjustments, based

upon known United States market results and recognized positive correlation between upward movements in United States and foreign markets, prior to the daily calculation of the fund NAV and the netting of share prices as well as their use of stale prices in the valuation of the fund's portfolio securities prior to the daily calculation of the fund NAV and the setting of share prices;

vi. whether defendants breached the duties they owed to plaintiffs and the class;

vii. whether plaintiffs and the class have been damaged and, if so,

viii. the extent of such damages.

45. The prosecution of separate actions by individual members of the Class would create a risk of:

i. inconsistent or varying adjudications with respect to individual members of the class; and

ii. adjudication with respect to individual members of the class, which would, as a practical matter, be dispositive of the interests of other members not parties to the adjudication or substantially impair or impede their ability to protect their interest.

46. The class action method is appropriate for the fair and efficient prosecution of this action.

47. Individual litigation of all claims, which might be brought by all class members would produce a multiplicity of cases so that the judicial system would be congested for years. Class treatment, by contrast, provides manageable judicial treatment calculated to bring a rapid conclusion to all litigation of all claims arising from the conduct of the defendants.

48. The certification of a class would allow litigation of claims that, in view of the expense of the litigation, may be insufficient in amount to support separate actions.

Count I

COMES NOW Plaintiff, ROBERT POTTER, individually and on behalf of all others similarly situation, by and through his undersigned counsel, and for Count I of his complaint against Defendants JANUS FUNDS and JANUS FUNDS MANAGER, states as follows:

49. Plaintiff repeats and incorporates by reference paragraphs 1 through 48 as if fully set forth herein.

50. Defendant JANUS FUNDS operates Janus Overseas as an open end mutual fund with the stated goal of providing long term capital growth to investors who hold shares of the fund. The fund expressly states in its prospectus that it seeks to achieve its investment goal through a policy of investing in stocks and debt obligations of companies outside of the United States.

51. Defendant JANUS FUNDS MANAGER serves as the investment manager for Janus Overseas. Defendant JANUS FUNDS MANAGER provides, among other things, portfolio management services and selects the securities for Janus Overseas to buy, hold or sell. Janus Overseas pays Defendant JANUS FUNDS MANAGER set fees based on the percentage of assets under management for managing Janus Overseas' assets. Defendant JANUS FUNDS MANAGER's compensation and management of the Janus Overseas Fund are required to be reviewed and approved by Defendant Janus Fund's board of trustees.

52. At all times relevant hereto, Plaintiff POTTER has owned shares in Janus Overseas.

53. In undertaking their role as investment managers with respect to the Funds, Defendants directly or impliedly hold themselves out as skilled specialists in the field of investment management, possessing the knowledge, skill and care ordinarily used by reasonably well-qualified members of their profession.

54. It thereby became the duty of Defendants to exercise that degree of knowledge, skill and care ordinarily used by reasonably well-qualified members of their profession.

55. Defendants knew, or were negligent in not knowing, that the closing prices for the foreign securities represented in the Janus Overseas Fund and used by Defendants to calculate NAV for said Fund did not represent fair value because, inter alia, those prices did not reflect changes in trading prices as a result of trading which Defendants knew, or were negligent in not knowing, occurred daily after the closing of the New York Stock Exchange.

56. Defendants breached their duties of due care owed to Plaintiff Potter and similarly situated owners of the Janus Overseas Fund by, inter alia:

i. failing to properly evaluate on a daily basis whether a significant event affecting the value of Janus Overseas' portfolio of securities had occurred after the foreign trading markets for such securities had closed but before Defendants calculated NAV and share prices;

ii. failing to implement Janus Overseas' portfolio valuation and share pricing policies and procedures; and

iii. allowing portfolio valuation and share pricing policies and procedures which benefited market timing traders of Janus Overseas shares' at the expense of long term shareholders.

57. As a direct and proximate result of the Defendants' breach of their duties, Plaintiff Potter and the class have suffered damages in the amount to be proven at trial, but less than $75,000 per plaintiff or class member, including all compensatory damages, punitive damages, attorneys' fees and costs.

WHEREFORE, Plaintiffs and the Class pray that the Court enter judgment in their favor and against defendants

JANUS INVESTMENT FUND and JANUS CAPITAL MANAGEMENT LLC, as follows:

A. Ordering that this action be maintained as a class action pursuant to 735 ILCS 5/2 801 and the following class be certified:

> All persons in the United States who held shares in the Janus Overseas Fund or Scudder International Fund for a period of more than fourteen days before redeeming or exchanging them during the period beginning five years prior to the date of the filing of this complaint;

B. Awarding Plaintiffs and the Class compensatory damages, prejudgment interest, costs of suits, punitive damages and attorneys' fees for an amount representing the damages caused by Defendants' breach of their duties not to exceed $75,000 per plaintiff or class member.

PLAINTIFFS DEMAND TRIAL BY JURY

Count II

COMES NOW Plaintiff, ROBERT POTTER, individually and on behalf of all others similarly situation, by and through his undersigned counsel, and for Count II of his Complaint against Defendants JANUS FUNDS and JANUS FUNDS MANAGER, states as follows:

58. Plaintiff repeats and incorporates by reference paragraphs 1 through 48 and 50 through 55 as if fully set forth herein.

59. On or about January 1, 1965, applicable published regulations expressly recognized that changes in trading prices of securities in the Janus Overseas Fund might occur daily after the closing of the New York Stock Exchange

60. With utter indifference and conscious disregard for Plaintiff POTTER'S investment and the investments of similarly situated fund owners, Defendants willfully and wantonly breached their duties to Plaintiff POTTER and similarly situated owners by, inter alia:

i failing to know and implement applicable rules and regulations concerning the calculation of NAV;

ii. failing to properly evaluate on a daily basis whether a significant event affecting the value of Janus Overseas' portfolio of securities had occurred after the foreign trading markets for such securities had closed but before Defendants calculated NAV and share prices;

iii. failing to implement Janus Overseas' portfolio valuation and share pricing policies and procedures; and

iv. allowing portfolio valuation and share pricing policies and procedures which benefited market timing trader of Janus Overseas' shares at the expense of long term shareholders.

61. As a direct and proximate result of the Defendants' breach of their duties, Plaintiff Potter and the class have suffered damages in the amount to be proven at trial, but less than $75,000 per plaintiff or class member, including all compensatory damages, punitive damages, attorneys' fees and costs.

WHEREFORE, Plaintiffs and the Class pray that the Court enter judgment in their favor and against Defendants JANUS INVESTMENT FUNDS and JANUS CAPITAL MANAGEMENT LLC, as follows:

A. Ordering that this action be maintained as a class action pursuant to 735 ILCS 5/2 801 and the following class be certified:

> All persons in the United States who held shares in the Janus Overseas Fund or Scudder International Fund for a period of more than fourteen days before redeeming or exchanging there from the period beginning five years prior to the date of the filing of this complaint;

B. Awarding Plaintiffs and the Class compensatory damages, prejudgment interest, costs of suits, punitive damages and attorneys' fees for an amount representing the damages caused by Defendants' breach of their duties not to exceed $75,000 per plaintiff or class member.

PLAINTIFFS DEMAND TRIAL BY JURY

Count III

COMES NOW Plaintiff, DOROTHY LEUTTINGER, individually and on behalf of all others similarly situated, by and through her undersigned counsel, and for Count III of her Complaint against Defendants SCUDDER FUNDS and SCUDDER FUND MANAGER, states as follows:

62. Plaintiff repeats and incorporates by reference paragraphs 1 through 48 as if fully set forth herein.

63. Defendant SCUDDER FUNDS operates Scudder International Fund as an open end mutual fund with the stated goal of providing long term capital growth to investors who hold shares of the fund. The fund expressly states in its prospectus that it seeks to achieve its investment goal through a policy of investing in stocks and debt obligations of companies outside of the United States.

64. Defendant SCUDDER FUND MANAGER serves as the investment manager for Scudder International. Defendant SCUDDER FUND MANAGER provides, among other things, portfolio management services and selects the securities for Scudder International to buy, hold or sell. Scudder International pays Defendant SCUDDER FUND MANAGER set fees based on the percentage of assets under management for managing Scudder International's assets. Defendant SCUDDER FUND MANAGER's compensation and management of the Scudder International Fund are required to be reviewed and approved by Defendant Scudder Funds' board of directors.

65. At all times relevant hereto, plaintiff LEUTTINGER has owned shares in Scudder International.

66. In undertaking their role as investment managers with respect to the Funds, Defendants directly or impliedly held themselves out as skilled specialists in the field of investment management, possessing the knowledge, skill and care ordinarily used by reasonably well-qualified members of their profession.

67. It thereby became the duty of Defendants to exercise that degree of knowledge, skill and care ordinarily used by reasonably well-qualified members of their profession.

68. Defendants knew, or were negligent in not knowing, that the closing prices for the foreign securities represented in the Scudder International Fund and used by Defendants to calculate NAV for said Fund did not represent fair value because, inter alia, those prices did not reflect changes in trading prices as a result of trading which Defendants knew, or were negligent in not knowing, occurred daily after the closing of the New York Stock Exchange.

69. Defendants breached their duties of due care owed to Plainntiff LEUTTINGER and similarly situated owners of the Scudder International Fund by, inter alia:

i. failing to properly evaluate on a daily basis whether a significant event affecting the value of Scudder International's portfolio of securities had occurred after the foreign trading markets for such securities had closed but before Defendants calculated NAV and share prices;

ii. failing to implement Scudder International's portfolio valuation and share pricing policies and procedures; and

iii. allowing portfolio valuation and share pricing policies and procedures which benefited market timing traders of Scudder International's shares at the expense of long term shareholders.

70. As a direct and proximate result of the Defendants' breach of their duties, plaintiff LEUTTINGER and the class have suffered damages in the amount to be proven at trial,

but less than $75,000 per plaintiff or class member, including all compensatory damages, punitive damages, attorneys' fees and costs.

WHEREFORE, Plaintiffs and the Class pray that the Court enter judgment in their favor and against Defendants SCUDDER INTERNATIONAL FUND, INC. and DEUTSCHE INVESTMENT MANAGEMENT AMERICAS, INC., as follows:

A. Ordering that this action be maintained as a class action pursuant to 735 ILCS 5/2 801 and the following class be certified:

> All persons in the United States who held shares in the Janus Overseas Fund or Scudder International Fund for a period of more than fourteen days before redeeming or exchanging them during the period beginning five years prior to the date of the filing of this complaint;

B. Awarding Plaintiffs and the Class compensatory damages, prejudgment interest, costs of suits, punitive damages and attorneys' fees for an amount representing the damages caused by Defendants' breach of their duties not to exceed $75,000 per plaintiff or class member.

PLAINTIFFS DEMAND TRIAL BY JURY

Count IV

COMES NOW Plaintiff, DOROTHY LEUTTINGER, individually and on behalf of all others similarly situated, by and through her undersigned counsel, and for Count IV of her Complaint against Defendants SCUDDER FUNDS and SCUDDER FUND MANAGER, states as follows:

71. Plaintiff repeats and incorporates by reference paragraphs 1 through 48 and 63 through 68 as if fully set forth herein.

72. On or about January 1, 1965, applicable published regulations expressly recognized that changes in trading prices of securities in the Scudder International Fund might

occur daily after the closing of the New York Stock Exchange.

73. With utter indifference and conscious disregard for Plaintiff's investment and the investments of similarly situated fund owners, Defendants willfully and wantonly breached their duties to Plaintiff Leuttinger and similarly situated owners by, inter alia:

i. failing to know and implement applicable rules and regulations concerning the calculation of NAV;

ii. failing to properly evaluate on a daily basis whether a significant event affecting the value of Scudder International's portfolio of securities had occurred after the foreign trading markets for such securities had closed but before Defendants calculated NAV and share prices;

iii. failing to implement Scudder Intemational's portfolio valuation and share pricing policies and procedures; and

iv. allowing portfolio valuation and share priciug policies, and procedures which benefitted market timing traders of Scudder International's shares at the expense of long term shareholders.

74. As a direct and proximate result of the Defendants' breach of their duties. Plaintiff Leuttinger and the class have suffered damages in the amount to be proven at trial, but less than $75,000 per plaintiff or class member, including all compensatory damages, punitive damages, attorneys' fees and costs.

WHEREFORE, Plaintiffs and the Class pray that the Court enter judgment in their favor and against Defendants SCUDDER INTERNATIONAL FUND, INC. and DEUTSCHE INVESTMENT MANAGEMENT AMERICAS, INC., as follows:

A. Ordering that this action be maintained as a class action pursuant to 735 ILCS 5/2 801 and the following class be certified:

> All persons in the United States who held shares in the Janus Overseas Fund or Scudder International Fund for a period of more than fourteen days before redeeming or exchanging them during the period beginning five years prior to the date of the filing of this complaint;

B. Awarding Plaintiffs and the Class compensatory damages, prejudgment interest costs of suits, punitive damages and attorneys' fees for an amount representing the damages caused by Defendants' breach of their duties not to exceed $75,000 per plaintiff or class member.

PLAINTIFFS DEMAND TRIAL BY JURY

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FILED
DEC 13 2005
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SUPREME COURT, U.S.

No. 05-409

IN THE
Supreme Court of the United States

CARL KIRCHER, ET AL.,
Petitioners,

v.

PUTNAM FUNDS TRUST, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

ARGUMENT:

I. The Circuits Are In Acknowledged Conflict Over The Appealability Of Remand Orders Under SLUSA 1

II. *Kircher I* Conflicts With This Court's Precedent 7

III. In The Alternative, The Court Should Hold The Petition For *Dabit* 9

CONCLUSION 10

TABLE OF AUTHORITIES

Page

CASES

Abada v. Charles Schwab & Co., 300 F.3d 1112 (9th Cir. 2002) 2, 3, 4

Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975) 9

Dabit v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 395 F.3d 25 (2d Cir. 2005), *cert. granted*, 126 S. Ct. 34 (2005) 4, 6, 10

Disher v. Citigroup Global Markets Inc., 419 F.3d 649 (7th Cir. 2005) 4

Erb v. Alliance Capital Mgmt., L.P., 423 F.3d 647 (7th Cir. 2005) 4

Jefferson County v. Acker, 527 U.S. 423 (1999) 8

Kontrick v. Ryan, 124 S. Ct. 906 (2004) 4, 5

McCray v. New York, 461 U.S. 961 (1983) 7

Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit, 126 S. Ct. 34 (2005) (No. 04-1371) 1

Scarborough v. Principi, 124 S. Ct. 1856 (2004) 4, 5

Spielman v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 332 F.3d 116 (2d Cir. 2003) 2, 4, 6

Stevens v. Brink's Home Sec., Inc., 378 F.3d 944 (9th Cir. 2004) 4

United Investors Life Ins. Co. v. Waddell & Reed Inc., 360 F.3d 960 (9th Cir. 2004) 2, 3, 4, 5

Venezia v. Robinson, 16 F.3d 209 (7th Cir. 1994) 9

Williams v. AFC Enters., Inc., 389 F.3d 1185 (11th Cir. 2004) 5

Willingham v. Morgan, 395 U.S. 402 (1969) 8

WTC Disaster Site, In re, 414 F.3d 352 (2d Cir. 2005) 4

CONSTITUTION, STATUTES, AND REGULATIONS

U.S. Const. Art. III 7

Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 6

Securities Act of 1933, 15 U.S.C. §§ 77a *et seq.*:

15 U.S.C. § 77p(b) 2

15 U.S.C. § 77p(c) 2

15 U.S.C. § 77p(d)(4) 3

Securities Exchange Act of 1934, 15 U.S.C. §§ 78a *et seq.*:

§ 28(f)(1)(A), 15 U.S.C. § 78bb(f)(1)(A) 2

§ 28(f)(2), 15 U.S.C. § 78bb(f)(2) 2

Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, 112 Stat. 3227 ..... *passim*

28 U.S.C. § 1331 7

28 U.S.C. § 1442 7

17 C.F.R.:

§ 240.10b-5 (Rule 10b-5) 9

Respondents "acknowledge" (Opp. 10) the existence of a square circuit split on the first question presented in the petition. They also concede that the Court has recently agreed to review the second question presented on the scope of SLUSA preemption, in *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, No. 04-1371. Respondents nonetheless argue that the jurisdictional question is not worthy of the Court's attention, and that the decision below did not turn on the Seventh Circuit's resolution of the preemption question, which, according to respondents, was mere dictum. Respondents seem to think this Court granted certiorari in *Dabit* absent a true circuit conflict.

Neither position has merit. The Court should grant the petition to consider the appealability of remand orders following findings that SLUSA does not preclude a lawsuit, which is not at issue in *Dabit*. At the very least, the Court should hold the petition pending resolution of *Dabit*.

I. The Circuits Are In Acknowledged Conflict Over The Appealability Of Remand Orders Under SLUSA

In *Kircher I*, the Seventh Circuit held, contrary to the prior holdings of two other circuits, that a district court's remand order based on a conclusion that SLUSA did not preempt the plaintiff's claims, and that the court therefore lacked subject-matter jurisdiction, was immediately appealable. Respondents concede that "the decision below conflicts with the Second Circuit's decision in *Spielman* and the Ninth Circuit's decision in *Abada* (which was adhered to by the same court in *United Investors*)." Opp. 10.

Respondents nevertheless suggest that the Court should not grant certiorari because the Second and Ninth Circuits might reverse themselves in light of the outcome in *Kircher I*. That suggestion reflects the most baseless form of wishful thinking. There is no reason to suppose that litigants in the Second and Ninth Circuits will seek appellate review of SLUSA remand orders despite clear circuit precedent forbidding such review; that both circuits will decide to hear a case presenting the jurisdictional question

en banc; and that both circuits will reverse their own precedent because of the result in *Kircher I*. Indeed, respondents cite no instance in which the circuits have ever before self-resolved a conflict in such an improbable fashion. The Second and Ninth Circuits squarely, and correctly, rejected the reasoning of *Kircher I*. They found it clear that SLUSA's removal provision[1] authorizes removal only of actions that fall within the scope of subsection (b), SLUSA's preemption provision. *See, e.g., Spielman*, 332 F.3d at 123 (stating that "SLUSA's removal provision makes removable any class action preempted by" § 78bb(f)(1)(A), SLUSA's preemption provision, and that "Congress could not have spoken more clearly").

The Second and Ninth Circuits concluded that a remand based on a failure to meet the requirements of SLUSA's preemption provision was also a decision that SLUSA's removal provision had not been satisfied, and thus was indisputably a remand for lack of subject-matter jurisdiction.[2] As the Ninth Circuit explained in *United Investors*, "the district court's subject matter jurisdiction depended entirely on SLUSA's preemptive scope. As such, the district court's jurisdictional and merits analyses were inseparably connected: in order to establish jurisdiction over [the defendant's] motion to dismiss, the district court

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[1] That provision permits removal of "[a]ny covered class action brought in any State court involving a covered security, *as set forth in subsection (b)*." 15 U.S.C. § 77p(c) (emphasis added); *accord id.* § 78bb(f)(2).

[2] *See Spielman*, 332 F.3d at 125 (SLUSA completely preempts those claims within the scope of its preemption provision; "[i]f a district court determines the action is *not* a 'preempted class action' and, therefore, removal was improper, the district court lacks subject matter jurisdiction to further entertain the action"); *id.* at 131-32 (Newman, J., concurring) (preemption and the existence of subject-matter jurisdiction "are the opposite sides of the same coin"); *Abada*, 300 F.3d at 1119 ("[T]o decide whether it had subject matter jurisdiction, the district court was required to decide whether Abada's claims were completely preempted by SLUSA.").

would have had to decide [the defendant's] SLUSA preemption claim in its favor." 360 F.3d at 966.

Kircher I, on the other hand, simply ignored the crucial language in SLUSA's removal provision – "as set forth in subsection (b)" – and held that, to determine whether an action was properly removed, a federal court had to consider one requirement for preemption – whether the action was a covered class action, *see* Pet. App. 14a – but not the other requirements. The Seventh Circuit offered no justification for differentiating the various prongs of SLUSA's preemption test when the removal provision draws no such distinction. *Kircher I* argued that whether a lawsuit is "in connection with the purchase or sale of a covered security" is a "substantive decision" that Congress "authorized" federal courts to make. *Id.* However, whether an action is a "covered class action" is no less a "substantive decision" that Congress "authorized" federal courts to make. Federal courts' "authority" to decide the substantive question stems from their jurisdiction to determine their own subject-matter jurisdiction. *See* Pet. 19-20; *Abada*, 300 F.3d at 1118.

Kircher I is flawed in other respects as well. It asserted that the district courts had found removal proper, despite each of those courts' unambiguous statements to the contrary. *See* Pet. 17-18. It also relied on the language of SLUSA's remand provision, *see* Pet. App. 13a, which applies only when the remand is based on a finding that the action, though it meets the requirements of SLUSA's preemption provision (and therefore of SLUSA's removal provision), falls within the specific exceptions to preemption enumerated in subsection (d) (preserving, for example, class actions brought by States and/or their political subdivisions). *See* 15 U.S.C. § 77p(d)(4) ("if the Federal court determines that the action may be maintained in State court *pursuant to this subsection*, the Federal court shall remand such action to such State court") (emphasis added). No other court of appeals has endorsed the Seventh Circuit's erroneous interpretation of SLUSA's removal provi-

sion, and there is no reason to think the Second and Ninth Circuits will both reverse course and adopt the Seventh Circuit's minority view. Moreover, there is no prospect that the Seventh Circuit will reconsider *Kircher I*, because not only did it follow that decision in *Disher*, *see* 419 F.3d at 652, but it has recently held that *Kircher I* merely followed settled circuit precedent. *See Erb v. Alliance Capital Mgmt., L.P.*, 423 F.3d 647, 652 (7th Cir. 2005).

Nor is there any reason to expect a reversal in position by the Second or Ninth Circuit because of the Supreme Court's decisions in *Scarborough* and *Kontrick*. Those cases have no bearing on the analysis of *Spielman* or *Abada*. *Kontrick* held that a timing rule regarding when a complaint objecting to a debtor's discharge had to be filed was not "jurisdictional" in the sense of affecting the court's subject-matter jurisdiction (as both sides in the case conceded), and that Kontrick could therefore waive his defense based on that rule. *Scarborough* similarly concluded that a timing rule for fee applications did not affect subject-matter jurisdiction. By contrast, the requirements of SLUSA's preemption and removal provisions are jurisdictional in the strict sense: if those requirements are not met, a federal court lacks subject-matter jurisdiction, and a remand based on a conclusion that the requirements are not satisfied is a remand for lack of jurisdiction. *See Spielman*, 332 F.3d at 123 (SLUSA completely preempts, and thus confers federal jurisdiction over, only those claims within the scope of its preemption provision).

For that reason, respondents' concession that the Ninth Circuit reaffirmed the reasoning of *Abada* after *Scarborough* and *Kontrick* is telling. *See United Investors*, 360 F.3d at 963-67. The Second Circuit similarly reaffirmed *Spielman* after *Scarborough* and *Kontrick*. *See Dabit*, 395 F.3d at 33-34. *See also Stevens v. Brink's Home Sec., Inc.*, 378 F.3d 944, 948-49 (9th Cir. 2004) (relying on *Abada*); *In re WTC Disaster Site*, 414 F.3d 352, 366 (2d Cir. 2005) (relying on *Spielman*). Respondents – like the Seventh Circuit below – are simply attempting to deflect this

Court's attention away from the clear conflict created by *Kircher I* by contending (Opp. 11) that *Scarborough* and *Kontrick* would alter other circuits' analysis. Nothing in the reasoning or subsequent treatment of the issues in those circuits supports that view.

Respondents' assertion (at 12 n.4) that *Williams* is "entirely consistent" with the decision below has no merit. *Williams* specifically recognized that SLUSA's removal provision made reference to its preemption provision, and held that the district court's remand order was not reviewable because it followed a conclusion that the lawsuit fell outside the scope of the preemption clause. *See* 389 F.3d at 1189. Although *Williams* involved a lawsuit that was not preempted because it arose under federal law, not a lawsuit that was not "in connection with the purchase or sale," *Kircher I* itself recognized the existence of a circuit conflict in such circumstances, *i.e.*, where two courts applied different interpretations of SLUSA's removal provision to non-identical facts. *See* Pet. App. 15a-16a (stating that its holding conflicted with the Ninth Circuit's decision in *United Investors*). The Seventh Circuit presumably regarded the decisions as conflicting because the Ninth Circuit, like the Eleventh, held that SLUSA's preemption and removal provisions are coextensive. The bottom line is that, once the *Williams* court found the plaintiffs' claims not to be preempted under SLUSA, it held the case to be not removable or reviewable on appeal – and that holding cannot be squared with *Kircher I*.

Respondents' argument that the question presented is not important because it affects only securities class actions, not *all* class actions, likewise is unpersuasive. The circuit split over the interpretation of SLUSA's removal provision has a substantial impact on the docket of the federal courts. *See* Pet. 21. The mere fact that the statute concerns removability of one type of lawsuit – albeit a type important enough for Congress to address in a separate statute – is no reason to deny certiorari where a well-recognized circuit conflict exists over construing the Act.

Contrary to respondents' assertion (Opp. 13), passage of the Class Action Fairness Act of 2005 ("CAFA") *increases*, not diminishes the importance of the question whether SLUSA remand orders are subject to appellate review. Respondents concede that CAFA has no effect on securities lawsuits, and the fact that Congress left SLUSA removability in the hands of the courts by exempting securities class actions from CAFA's scope strongly suggests an intent for the Court to resolve conflicts under SLUSA when and if they should arise.

Respondents are also wrong that *Kircher I*'s misinterpretation of SLUSA's removal provision is "entirely consistent" with CAFA's explicit authorization of appellate review of remand orders. Opp. 13. When Congress wanted to permit appellate review of remand orders in the class action context, it did so explicitly, as in CAFA, but not in SLUSA. *See Spielman*, 332 F.3d at 127 ("Conspicuously absent from SLUSA is any express language suggesting that it operates to override the appealability exclusion of Section 1447(d). . . . It is not our place as jurists to supply that which is omitted by the legislature.").

Finally, the pendency of *Dabit* in no way counsels against deciding the jurisdictional question presented. *Dabit* itself does not involve that question. Moreover, whatever *Dabit* decides about preemption of claims brought by holders of securities, the lower courts will face outstanding issues as to whether plaintiffs' claims are "in connection with" purchases or sales. In *Dabit* itself, the plaintiffs asserted claims regarding lost fees that Merrill Lynch argued were "in connection with the purchase or sale" of securities, but that the Second Circuit found were not preempted even under the broad definition of that phrase endorsed by Merrill Lynch. *See* 395 F.3d at 47. Merrill Lynch did not seek review of that holding. The Solicitor General's amicus brief in *Dabit* similarly observes that the case does not call upon the Court to determine the "outer limits" of the "in connection with" requirement. U.S. Br. at 13 n.2, No. 04-1371. If the Court rules in

Dabit's favor, respondents here concede that defendants will likely make many attempts to appeal remand orders that implicate the jurisdictional question presented. *See* Opp. 14. But even if the Court rules for Merrill Lynch, there will still be many disputes regarding the coverage of the "in connection with" language, which will lead to removals, remands based on findings of no preemption, and efforts by defendants to appeal those remand orders. Even putting aside that *Dabit* will not resolve all issues relating to the scope of "in connection with the purchase or sale," disputes over the proper construction of SLUSA's other preemption requirements – *e.g.*, that a claim allege a misrepresentation, omission, or manipulative or deceptive device – will similarly generate attempts to appeal remand orders. Respondents are wrong to suggest that *Dabit* could somehow render the jurisdictional issue moot.

In sum, further percolation on the jurisdictional question presented will not amplify the range of arguments available. The circuits' opposing interpretations of SLUSA's removal provision are well-defined and should be addressed by this Court.[3]

II. *Kircher I* Conflicts With This Court's Precedent

Respondents argue that the decision below is correct because Congress may confer Article III "arising under" jurisdiction even when federal question jurisdiction under 28 U.S.C. § 1331 does not exist, and because Congress may authorize federal courts to adjudicate the merits of federal defenses, as it did in the federal officer removal statute, 28 U.S.C. § 1442. These arguments are irrelevant. Neither addresses the crucial point that SLUSA's removal provi-

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[3] This case is nothing like *McCray v. New York*, 461 U.S. 961 (1983), cited by respondents (at 13), where Justice Stevens suggested further percolation was warranted because "[t]here is presently no conflict of decision within the federal system" and the question presented involved peremptory challenges. 461 U.S. at 962-63 (Stevens, J., respecting denial of certiorari). Such challenges had traditionally been unreviewable, and States had only recently begun to grapple with the procedural and substantive problems posed by judicial review.

sion plainly confers jurisdiction *over only those claims that SLUSA preempts*. The cases cited by respondents only emphasize the need to make a showing that the requirements of a particular removal statute are satisfied before a court may uphold removal and exercise jurisdiction.

Respondents' cases deal with the federal officer removal statute, which allows federal officers to remove to federal court any state-court civil action commenced against them "for any act under color of office." That statute upholds important sovereignty interests not present in SLUSA. In *Jefferson County v. Acker*, 527 U.S. 423 (1999), the Court held that, to qualify for removal, the officer must establish that the suit is "for an act under color of office," *id.* at 431 – just as to qualify for removal under SLUSA a defendant must establish that a lawsuit is a "covered class action . . . as set forth in subsection (b)." The Court found it unnecessary for the officer to prove an "airtight case on the merits" or a "clearly sustainable defense," as opposed to a "colorable defense." *Id.* at 432. The Court reasoned that such a prerequisite would defeat the statute's purpose, which is to have federal courts adjudicate the validity of the defense. Here, by contrast, there is no question of defeating the purpose of SLUSA's removal provision. If the Court agrees with petitioners, federal courts will still determine whether cases are preempted and therefore properly removed. But that does not mean that remand orders are appealable, contrary to the general rule. SLUSA contains a textual requirement that actions must be preempted to be removed. In the consolidated cases below, defendants simply removed the lawsuits and none of the district courts found that they had shown SLUSA preemption.[4]

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[4] *Willingham v. Morgan*, 395 U.S. 402 (1969), is similarly off-point. That case rejected a "narrow, grudging interpretation" of the federal officer removal statute that had no basis in the text, namely, an interpretation that would not permit removal even when an officer did have a valid defense on the merits. *Id.* at 405-07. The Court held that, if the defendant demonstrated a causal connection between the charged conduct and the asserted official activity, this showed the lawsuit was for an act under color of office and warranted removal. *Id.* at 409. *See also*

Respondents go farther than the Seventh Circuit in arguing that, so long as defendants allege SLUSA preemption in a "colorable" fashion, removal is always proper. The Seventh Circuit conceded that, if an action is not a "covered class action," removal is improper. *See* Pet. App. 14a. The Seventh Circuit did not hold that defendants need only make a "colorable" assertion that an action is a covered class action.

III. In The Alternative, The Court Should Hold The Petition For *Dabit*

Even if the Court determines not to grant review of the jurisdictional question presented at this time, it should hold this petition pending resolution of *Dabit*. Respondents offer no reason why this Court should not follow its customary practice of holding petitions raising the same issue as a case on which certiorari has been granted. Instead, they assert that *Kircher II*'s holding that SLUSA does not preempt holder claims was dictum because petitioners would have lost below regardless of how the Seventh Circuit decided the substantive question presented. The Seventh Circuit, however, did not understand its opinion that way. *Kircher II* explained that, because the complaint in the *Spurgeon* case successfully defined a class of holders, "we must answer the question" of whether SLUSA preempts holder claims "rather than postpone its resolution." Pet. App. 7a. *Kircher II* did argue that some of the plaintiffs – those whose purchases occurred during the limitations period – could have brought their claims under Rule 10b-5. *See id.* at 9a. The court thus thought those plaintiffs might have possessed *Blue Chip Stamps* standing had they defined their class and pleaded their claims differently; because they did not, the court found it neces-

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Venezia v. Robinson, 16 F.3d 209, 212 (7th Cir. 1994) (noting that removing party must establish that he is a federal official and that he has a plausible defense, but need not demonstrate that he is entitled to prevail on the federal defense). None of the officer removal cases supports reading SLUSA's removal provision to authorize appeal of remand orders.

sary to resolve the substantive question presented. *See also* Cert. Reply Br. at 2-3, No. 04-1371.

Respondents essentially admit that the Seventh Circuit's ruling was not dictum in arguing that the court's skepticism about whether the consolidated cases involved true holder claims is "dispositive as to all of the complaints *but one*." Opp. 20 (emphasis added). The class definition in *Spurgeon* mandates that the Court hold this petition for *Dabit*. But the market-timing claims in all of the complaints can *only* be brought by holders of securities; market timing simply does not affect purchasers or sellers. The Court's conclusions in *Dabit* thus will affect the proper disposition of the other cases below. For example, the Seventh Circuit contended that the complaints other than that in *Spurgeon* should be dismissed because the plaintiff classes were defined to include investors who held shares between two given dates, as well as possible purchasers or sellers. *See* Pet. App. 6a. The Second Circuit in *Dabit* made clear that, when a class definition includes holders as well as purchasers or sellers, the complaint should be dismissed *without* prejudice, to "allow the plaintiff to plead a claim sounding only in state law if possible." 395 F.3d at 47. Thus, if the Supreme Court agrees with the Second Circuit, the plaintiffs in the cases other than *Spurgeon* should be permitted to amend their complaints.[5]

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted. In the alternative, the Court should hold the petition pending resolution of *Dabit*.

---

[5] On remand from *Kircher II*, petitioners were not permitted to amend their complaints – the courts read *Kircher II* as foreclosing that opportunity.

Respectfully submitted,

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December 13, 2005

FILED
FEB 21 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 05-409

IN THE

Supreme Court of the United States

CARL KIRCHER, ET AL.,
Petitioners,

v.

PUTNAM FUNDS TRUST, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

JOINT APPENDIX
(Volume I of II – Pages 1-165)

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TABLE OF CONTENTS

Page

VOLUME I

Relevant Docket Entries:

Third Judicial Circuit Court of Madison County, Illinois:

Parthasarathy, et al. v. T. Rowe Price International Funds, Inc., et al., Cause No. 03-L-1253 1

Potter, et al. v. Janus Investment Fund, et al., Cause No. 03-L-1254 6

Kircher, et al. v. Putnam Funds Trust, et al., Cause No. 03-L-1255 12

Dudley, et al. v. Putnam International Equity Fund, et al., Cause No. 03-L-1539 17

Dudley, et al. v. Putnam Investment Funds, et al., Cause No. 03-L-1540 21

Vogeler v. Columbia Acorn Trust, et al., Cause No. 03-L-1550 25

Jackson v. Van Kampen Series Fund, Inc., et al., Cause No. 03-L-2036 30

Spurgeon v. Pacific Life Insurance Co., Cause No. 04-L-241 34

United States District Court for the Southern District of Illinois (East St. Louis):

Parthasarathy, et al. v. T. Rowe Price International Funds, Inc., et al., Civil No. 03-CV-673-DRH 37

Kircher, et al. v. Putnam Funds Trust, et al., Civil No. 03-CV-691-DRH 46

Potter, et al. v. Janus Investment Fund, et al., Civil No. 03-CV-692-DRH 52

Potter, et al. v. Janus Investment Fund, et al., Civil No. 03-CV-693-DRH 59

Vogeler v. Columbia Acorn Trust, et al., Civil No. 03-CV-843-DRH 62

Dudley, et al. v. Putnam International Equity Fund, et al., Civil No. 03-CV-852-GPM 67

Dudley, et al. v. Putnam Investment Funds, et al., Civil No. 03-CV-853-GPM 72

Jackson v. Van Kampen Series Fund, Inc., et al., Civil No. 04-CV-56-DRH 78

Spurgeon, etc. v. Pacific Life Insurance Co., et al., Civil No. 04-CV-355-MJR 82

United States Court of Appeals for the Seventh Circuit:

Kircher, et al. v. Putnam Funds Trust, et al., No. 04-1495 89

Dudley, et al. v. Putnam International Equity Fund, et al., No. 04-1496 98

Dudley, et al. v. Putnam Investment Management, LLC, et al., No. 04-1608 107

Parthasarathy, et al. v. Artisan Funds, Inc., et al., No. 04-1628 116

Luettinger, et al. v. Scudder International Fund, Inc., et al., No. 04-1650 123

Luettinger, et al. v. Janus Investment Fund, et al., No. 04-1651 131

Vogeler v. Columbia Wanger Asset Management L.P., et al., No. 04-1660 139

Vogeler v. Columbia Acorn Trust, No. 04-1661 146

Jackson v. Van Kampen Series Fund, Inc., et al., No. 04-2162 153

Spurgeon, etc. v. Pacific Life Insurance Co., et al., No. 04--2687 160

VOLUME II

Complaints:

Complaint, *Potter, et al. v. Janus Investment Fund, et al.*, Cause No. 03-L-1254 (filed Sept. 16, 2003) 166

Complaint, *Kircher, et al. v. Putnam Funds Trust, et al.*, Cause No. 03-L-1255 (filed Sept. 16, 2003) 189

First Amended Complaint, *Parthasarathy, et al. v. T. Rowe Price International Funds, Inc., et al.*, Cause No. 03-L-1253 (filed Oct. 3, 2003) 213

Complaint, *Dudley, et al. v. Putnam International Equity Fund, et al.*, Cause No. 03-L-1539 (filed Nov. 10, 2003) 242

Complaint, *Dudley, et al. v. Putnam Investment Funds, et al.*, Cause No. 03-L-1540 (filed Nov. 10, 2003) 260

Complaint, *Vogeler v. Columbia Acorn Trust, et al.*, Cause No. 03-L-1550 (filed Nov. 13, 2003) 277

Complaint, *Jackson v. Van Kampen Series Fund, Inc., et al.*, Cause No. 03-L-2036 (filed Nov. 13, 2003) 294

Complaint, *Spurgeon v. Pacific Life Insurance Co.*, Cause No. 04-L-241 (filed Mar. 12, 2004) 311

Notices of Removal/Consents to Removal:

Notice of Removal, *Parthasarathy, et al. v. T. Rowe Price International Funds, Inc., et al.*, Civil No. 03-CV-673-DRH (filed Oct. 16, 2003) 331

Consent to Removal, *Parthasarathy, et al. v. T. Rowe Price International Funds, Inc., et al.*, Civil No. 03-CV-673-DRH (filed Oct. 23, 2003) 337

Notice of Removal, *Kircher, et al. v. Putnam Funds Trust, et al.*, Civil No. 03-CV-691-DRH (filed Oct. 23, 2003) 341

Notice of Removal, *Potter, et al. v. Janus Investment Fund, et al.*, Civil No. 03-CV-693-DRH (filed Oct. 23, 2003) 358

Janus Capital's Notice of Consent to and Joinder in Removal, *Potter, et al. v. Janus Investment Fund, et al.*, Civil No. 03-CV-693-DRH (filed Oct. 23, 2003) 367

Notice of Removal, *Vogeler v. Columbia Acorn Trust, et al.*, Civil No. 03-CV-843-DRH (filed Dec. 12, 2003) 369

Notice of Removal, *Dudley, et al. v. Putnam International Equity Fund, et al.*, Civil No. 03-CV-852-GPM (filed Dec. 15, 2003) 373

Notice of Removal, *Dudley, et al. v. Putnam Investment Funds, et al.*, Civil No. 03-CV-853-GPM (filed Dec. 15, 2003) 390

Notice of Removal, *Jackson v. Van Kampen Series Fund, Inc., et al.*, Civil No. 04-CV-56-DRH (filed Jan. 22, 2004) 407

Notice of Removal, *Spurgeon, etc. v. Pacific Life Insurance Co., et al.*, Civil No. 04-CV-355-MJR (filed May 21, 2004) 413

IN THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

Cause No. 03-L-1253

T.K. PARTHASARATHY, EDMUND WOODBURY, STUART ALLEN SMITH, AND SHARON SMITH, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Plaintiffs,

v.

T. ROWE PRICE INTERNATIONAL FUNDS, INC., A CORPORATION, T. ROWE PRICE INTERNATIONAL, INC., ARTISAN FUNDS, INC., A CORPORATION, ARTISAN PARTNERS LIMITED PARTNERSHIP, AIM INTERNATIONAL FUNDS, INC., A CORPORATION, AND AIM ADVISORS, INC.,
Defendants.

DOCKET PROCEEDINGS

DATE	DOCKET ENTRY
9/16/03	Negligence Fee $186.00 Amt $50000.01 Plaintiff PARTHASARATHY T K IND AND ON B Defendant T ROWE PRICE INTERNATIONAL FUN
	* * * * *
10/03/03	ORDER THIS CAUSE COMING ON FOR HEARING ON PLTF'S MOTION FOR LEAVE TO AMEND AND THE COURT BEING FULLY ADVISED IN THE PREMISES, HEREBY GRANTS

	PLTF'S MOTION FOR LEAVE TO AMEND. S/MADDOX C/S TKC
10/3/03	FIRST AMENDED COMPLAINT
10/3/03	MOTION FOR LEAVE TO AMEND W/PROPSOED [*sic*] ORDER AND PROPSOED [*sic*] AMENDED COMPLAINT W/AFFIDAVIT OF STEPHEN M TILLERY
	* * * * *
10/17/03	NOTICE OF REMOVAL W/ ATTACHMENTS & NOTICE TO CLERK. FILED BY DEFTS: T. ROWE PRICE INTERNATIONAL FUNDS, INC., T. ROWE PRICE INTERNATIONAL, INC., AIM INTERNATIONAL FUNDS, INC. & AIM ADVISORS INC. DF
10/17/03	JUDGMENT/REMOVED TO U.S. DISTRICT COURT Status: U.S. REMOVAL Report: TERMINATED Oct. 17, 2003
	* * * * *
2/2/04	Case Reinstated Status: Open Case Report: REINSTATED Feb 2, 2004
2/4/04	CERT COPY OF MEMO AND ORDER FILED 2-2-04 REMANDING THIS ACTION TO THE MAD CO CIRCUIT COURT. IT IS SO ORDERED. S/DAVID R HERNDON US DISTRICT JUDGE.
	* * * * *
3/1/04	MOTIONS TO DISMISS PURS TO SECTION 5/2-301 FOR LACK OF PERSONAL JURISDICTION AND IN THE ALT TO STRIKE AND DISMISS PURS

	TO SECTION 5/2-615 FILED BY ARTISAN FUNDS INC AND ARTISAN PARTNERS LIMITED PARTNERSHIP
	* * * * *
3/12/04	MEMORANDUM IN SUPPORT OF MOTIONS (1) PURSUANT TO SEC 2-301 OF THE ILLINOIS CODE OF CIVIL PROCEDURE TO DISMISS FOR LACK OF PERSONAL JURISDICTION, AND (2) IN THE ALTNERNATIVE [*sic*] TO STRIKE AND DISMISS PURSUANT TO SECTION 2-615 OF THE ILLINOIS CODE OF CIVIL PROCEDURE FILED BY DEFS ARTISAN FUNDS INC & ARTISAN PARTNERS LIMITED PARTNERSHIP
	* * * * *
4/27/04	NOTICE OF PARTIAL WITHDRAWAL FILED BY Defendant ARTISAN FUNDS INC A CORPORATIO
	* * * * *
9/16/04	COPY OF LETTER FROM APPELLATE COURT STATING NOTICE OF INTERLOCUTORY APPEAL HAS BEEN RECEIVED ASSIGNED DOCKET NO 5-04-0569 FILED BY APPELLATE COURT
	* * * * *
10/29/04	ANSWER TO THE FIRST AMENDED COMPLAINT FILED BY Defendant AIM INTERNATIONAL FUNDS INC A
10/29/04	ANSWER TO THE FIRST AMENDED COMPLAINT FILED BY Defendant T ROWE PRICE INTERNATIONAL FUN
	* * * * *

11/23/04	MEMO OF LAW IN SUPPORT OF ITS MOT TO DISMISS FOR LACK OF PERSONAL JURISDICTION, MOT TO DISMISS FOR LACK OF PERSONAL JURISDICTION FILED BY DEFT T ROWE PRICE INTL.
11/30/04	MOTION TO STAY PROCEEDINGS PENDING APPEAL FROM REMAND ORDER W/ATTACH FILED BY Defendant ARTISAN FUNDS INC A CORPORATIO
	* * * * *
1/19/05	MOTION TO SEVER AND DISMISS PURSUANT TO DOCTRINE OF INTERSTATE FORUM NON CONVENIENS FILED BY DEFT T ROWE PRICE INTERNATIONAL FUNDS INC
1/27/05	MOTION TO SEVER AND DISMISS PURSUANT TO DOCTRINE OF INTERSTATE FORUM NON CONVENIENS W/EXHIBIT FILED BY AIM INTERNATIONAL FUNDS INC
	* * * * *
3/22/05	MOTION TO DSIMISS [*sic*] FOR LACK OF PERSONAL JURISDICTION AND EXHIBIT FILED BY Defendant AIM ADVISORS INC
	* * * * *
4/22/05	NOTICE TO CLERK OF REMOVAL, NOTICE OF REMOVAL W/ EXHIBIT A & B FILED BY DEFTS T ROWE PRICE INTERNATIONAL FUNDS, T ROWE PRICE INTERNATIONAL INC, AIM INTERNATIONAL FUNDS INC & AIM ADVISORS (PER JUDGE MENDEL-

SOHN CASE TO REMAIN OPEN UNTIL JUNE REVIEW HEARING. AT THAT TIME, THE MATTER OF DEFTS BEING SEVERED SHALL BE RESOLVED)

* * * * *

6/9/05 NOTICE THAT ORDER REMANDING THIS CASE TO THIS COURT HAS BEEN VACATED AND THAT PLTFS. CLAIMS HAVE BEEN DISMISSED WITH PREJUDICE. FILED BY ARTISAN PARTNERS LIMITED

6/14/05 ORDER (NOTIFICATION TO THE CLERK) – COURT BEIN ADVISED IN THE PREMISES, HEREBY DIRECTS THE CIRCUIT CLERK TO RECORD IN THE DOCKET THE CLOSURE OF THE FILE AGAINST ARTISAN PARTNERS AND ARTISAN FUNDS. S/ JUDGE MENDELSOHN C/S AM

* * * * *

IN THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

Cause No. 03-L-1254

ROBERT POTTER AND DOROTHY LUETTINGER,
INDIVIDUALLY AND ON BEHALF OF ALL OTHERS
SIMILARLY SITUATED,
Plaintiffs,

v.

JANUS INVESTMENT FUND, A BUSINESS TRUST;
JANUS CAPITAL MANAGEMENT, LLC;
SCUDDER INTERNATIONAL FUND, INC., A CORPORATION;
AND DEUTSCHE INVESTMENT MANAGEMENT AMERICAS, INC.,
Defendants.

DOCKET PROCEEDINGS

DATE	DOCKET ENTRY
9/16/03	Negligence Fee $186.00 Amt $50000.01 Plaintiff POTTER ROBERT IND AND ON BEHAL
	Defendant JANUS INVESTMENT FUND A BUSINE
	* * * * *
10/6/03	SUMMONS SERVED BY SPS ON 9/24/03 SERVED Defendant DEUTSCHE INVESTMENT MANAGEMENT
	* * * * *
10/10/03	SUMMONS SERVED BY SPS ON 9-25-03 (LEFT W/ CURT FAUST, ASST GEN

	COUNCIL) SERVED Defendant JANUS INVESTMENT FUND A BUSINE
10/10/03	SUMMONS SERVED BY SPS ON 9/25/03 – LEFT WITH CURT FAUST ASST GENL COUNCIL SERVED Defendant JANUS INVESTMENT FUND A BUSINE
10/16/03	SUMMONS SERVED 9/24/03 (JOHN MILLETTE, R/A) BY PPS SERVED Defendant SCUDDER INTERNATIONAL FUND INC
10/23/03	JUDGMENT/REMOVED TO U.S. DISTRICT COURT FILED BY Defendant JANUS CAPITAL MANAGEMENT LLC Status: U.S. REMOVAL Report: TERMINATED Oct. 23, 2003
10/23/03	JUDGMENT/REMOVED TO U.S. DISTRICT COURT – NOTICE OF FILING NOTICE OF R FILED BY Defendant SCUDDER INTERNATIONAL FUND INC Status: U.S. REMOVAL Report: TERMINATED Oct. 23, 2003

* * * * *

2/12/04	COPY OF ORDER FROM UNITED STATES DISTRICT COURT – THE COURT REMANDS THIS ACTION TO THE MADISON COUNTY ILLINOIS CIRCUIT COURT FURTHER THE COURT DENIES AS MOOT ALL OTHER PENDING MOTIONS FILED BY US DISTRICT COURT
2/12/04	Case Reinstated – SEE ORDER FROM UNITED STATES DISTRICT COURT

Status: Open Case Report: REINSTATED Feb 12, 2004

* * * * *

3/10/04 MOTION TO DISMISS, MEMO IN SUPPORT FILED BY Defendant JANUS INVESTMENT FUND A BUSINE Defendant JANUS CAPITAL MANAGEMENT LLC Judge: KARDIS PHILLIP Clerk: MS M

3/10/04 Motion CH, D, ED, F, L, MR (MOTION TO DISMISS), ENTRY OF APPEARANCE, JURY DEMAND Fee $86.00 FILED BY Defendant SCUDDER INTERNATIONAL FUND INC Judge: KARDIS PHILLIP Clerk: MS M

3/10/04 MEMO OF LAW IN SUPPORT OF THE SCUDDER DEFTS MOT TO TRANSF THE CASE TO THE PROPER VENUE FILED BY SCUDDER INTL FUND, INC.

3/10/04 THE SCUDDER DEFTS MOT TO TRANSF THE CASE TO THE PROPER VENUE, AFFID FILED BY Defendant SCUDDER INTERNATIONAL FUND INC

3/10/04 MEMO OF LAW IN SUPPORT OF THE SCUDDER DEFTS MOT TO DISMISS THE COMPL FILED BY Defendant SCUDDER INTERNATIONAL FUND INC

* * * * *

3/22/04 MOTION FOR LEAVE TO AMEND W/PROPOSED ORDER AND PROPOSED FIRST AMENDED COMPLAINT FILED BY PLTFS

* * * * *

3/31/04	ORDER-PLNTFS MOTION FOR LEAVE TO AMEND GRANTED. PLNTFS AMENDED COMPLAINT IS HEREBY FILED, INSTANTER. S/KARDIS C/S
3/31/04	FIRST AMENDED COMPLAINT FILED BY Plaintiff POTTER ROBERT IND AND ON BEHAL
	* * * * *
5/10/04	MOTION TO DISMISS THE AMENDED COMPLAINT ON GROUNDS OF LEGAL DEFECT FILED BY Defendant SCUDDER INTERNATIONAL FUND INC
5/10/04	MOTION TO TRANSFER THE CASE TO THE PROPER VENUE FILED BY Defendant SCUDDER INTERNATIONAL FUND INC
5/10/04	MOTION TO DISMISS THE AMENDED COMPLAINT ON GROUNDS OF MISJOINDER OR ALT TO SEVER THE CLAIMS AGAINST THEM FROM THE CLAIMS AGAINST THE JANUS DEFTS FILED BY DEFTS SCUDDER INTER FUND INC
5/10/04	MOTION TO DISMISS FIRST AMENDED COMPLAINT PURSUANT TO CODE OF CIVIL PROCEDURE 2-615 FILED BY DEFTS
	* * * * *
7/23/04	JOINT MOTION BY DEFENDANTS TO STAY ALL PROCEEDINGS PENDING RESOLUTION OF APPEAL FROM REMAND ORDER
	* * * * *

9/20/04	ORDER: CAUSE CALLED FOR HEARING ON DEF'S MOTION TO STAY ON 9/20/04 PARTIES APPEAR BY COUNSEL. ARGUMENT PRESENTED. COURT TAKES MATTER UNDER ADVISEMENT. S/HARRISON [C/S] [C] RPT:DEBBIE WALLIS]
	* * * * *
2/16/05	ORDER RE: CMC. COURT HEREBY ORDERS THAT ALL PROCEEDINGS IN THIS STATE COURT CASE ARE SUSPENDED FOR A PERIOD OF 120 DAYS FROM THE DATE OF THIS ORDER. UPON REQUEST BY DEFTS THE COURT AS [*sic*] SUCH HRG MAY ORDER THE CONSIDERATION OF DEFTS MOT TO STAY BE RESUMED AND SET A DATE BY WHICH THE PARTIES SHALL PROVIDE THE COURT WITH THE MATERIALS THE COURT REQUESTED WITH RESPECT TO SUCH MOTION IN ITS ORDER DATED 9-20-04. S/HARRISON CM
	* * * * *
6/17/05	NOTICE THAT ORDER REMANDING THIS CASE TO THIS COURT HAS BEEN VACATED AND THAT PLTFS CLAIMS HAVE BEEN DISMISSED W/PREJUDICE W/EXHIBITS FILED BY DEF JANUS CAPITAL MANAGEMENT LLC
6/20/05	JUDGMENT/DISMISSED. SEE ORDER OF 6/20/05 CASE DISMISSED BY US DISTRICT COURT. REMAND ORDER VACATED. S/O, C/S S/HARRISON

Status: Dismissed Case Report: TERMINATED Jun 20, 2005

* * * * *

IN THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

Cause No. 03-L-1255

CARL KIRCHER AND ROBERT BROCKWAY,
INDIVIDUALLY AND ON BEHALF OF ALL OTHERS
SIMILARLY SITUATED,
Plaintiffs,

v.

PUTNAM FUNDS TRUST, A BUSINESS TRUST,
PUTNAM INVESTMENT MANAGEMENT, LLC,
EVERGREEN INTERNATIONAL TRUST, A BUSINESS TRUST, AND
EVERGREEN INVESTMENT MANAGEMENT COMPANY, LLC,
Defendants.

DOCKET PROCEEDINGS

DATE	DOCKET ENTRY
9/16/03	CLASS ACTION (L) Fee $186.00 Amt $50000.01 Plaintiff KIRCHER CARL IND AND ON BEHALF Defendant PUTNAM FUNDS TRUST A BUSINESS
	* * * * *
10/23/03	NOTICE OF FILING NOTICE OF REMOVAL & NOTICE OF REMOVAL. FILED BY DEFS
10/23/03	JUDGMENT/REMOVED TO U.S. DISTRICT COURT Status: U.S. REMOVAL Report: TERMINATED Oct. 23, 2003

1/29/04	Case Reinstated – ORDER – THE COURT LACKS SUBJECT MATTER JURISDICTION THE COURT REMANDS THIS ACTION TO THE MADISON COUNTY ILLINOIS CIR COURT FURTHER THE COURT DENIES AS MOOT DEFTS MOTION TO STAY FILED BY [illegible] US SUPREME COURT Status: Open Case Report: REINSTATED Jan 29, 2004
	* * * * *
3/11/04	MOTION TO DISMISS, MEMORANDUM OF LAW W/ ATTACHMENTS FILED BY Defendant PUTNAM FUNDS TRUST A BUSINESS Defendant PUTNAM INVESTMENT MANAGEMENT L Judge: KARDIS PHILLIP Clerk: MD M
3/11/04	MOTION TO DISMISS COMPLAINT FOR FAILURE TO STATE A CLAIM AND FOR LACK OF STANDING & MEMORANDUM IN SUPPORT OF MOTION TO DISMISS COMPLAINT FOR FAILURE TO STATE A CLAIM AND FOR LACK OF STANDING FILED BY DEFS EVERGREEN INTERNATIONAL TRUST AND EVERGREEN INVESTMENT MANAGEMENT CO
	* * * * *
3/12/04	EXHIBITS TO MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS FILED BY Defendant PUTNAM FUNDS TRUST A BUSINESS Defendant PUTNAM INVESTMENT MANAGEMENT L

3/12/04	APPENDIX OF NON-ILLINOIS AUTHORITIES IN SUPPORT OF MOTION TO DISMISS FILED BY Defendant PUTNAM FUNDS TRUST A BUSINESS Defendant PUTNAM INVESTMENT MANAGEMENT L
	* * * * *
3/29/04	MOTION TO DISMISS PLTFS COMPLAINT PURSUANT TO DOCTRINE OF FORUM NON CONVENIENS, MEMO OF LAW IN SUPPORT OF THE MOTION TO DISMISS W/EXHIBITS FILED BY DEFTS PUTNAM INVESTMENT MANAGEMENT LLC AND PUTNAM FUNDS TRUST
4/1/04	MEMO IN SUPPORT OF MOT OF EVERGREEN INTERNATL TRUST AND EVERGREEN INVESTMENT MGMT CO, LLC TO DISMISS ON GROUNDS OF FORUM NON CONVENIENS W/ EXH FILED BY DEFTS EVERGREEN INTL TRUST AND EVERGREEN INVESTMENT MGMT CO, LLC.
4/1/04	MOTION OF EVERGREEN INTL TRUST AND EVERGREEN INVESTMENT MGMT CO, LLC TO DISMISS ON GROUNDS OF FORUM NON CONVENIENS FILED BY EVERGREEN INTL TRUST AND EVERGREEN INVESTMENT MGMT CO, LLC.
	* * * * *
4/28/04	ORDER – IT IS HEREBY ORDERED AND ADJUDGED THAT THE PUTNAM DEFTS ARE GRANTED LEAVE TO SUBSTITUTE THE ORIGINAL AFFIDAVIT OF CHARLES E PORTER FOR

	THE COPY OF SAID AFFIDAVIT WHICH IS ATTACHED AS EXHIBIT 1 TO THE MEMORANDUM OF LAW IN SUPPORT OF PUTNAM DEFTS MOTION TO DISMISS PURS TO THE DOCTRINE OF FORUM NON CONENIENS [*sic*] S/MORAN C/S
	* * * * *
5/3/04	MEMORANDUM IN OPPOSITION TO DEFTS MOTION TO DISMISS AND IN THE ALT MOTION FOR LEAVE TO AMEND THE COMPLAINT AND TO CONDUCT DISCOVERY AND EXHIBITS FILED BY PLTFS
5/3/04	SUPPLEMENTAL MEMORANDUM IN SUPPORT OF MOTION OF EVERGREEN INTERNATIONAL TRUST AND EVERGREEN INVESTMENT MANAGEMENT COMPANY LLC TO DISMISS COMPLAINT FOR FAILURE TO STATE A CLAIM AND FOR LACK OF STANDING AND ATTACHMENT FILED BY DEFS EVERGREEN INTERNATIONAL TRUST AND EVERGREEN INVESTMENT MANAGEMENT COMPANY LLC
	* * * * *
5/5/04	ORDER – DOCKET ORDER – CASE CALLED FOR HEARING THIS DATE MAY 5, 2004 ALL PARTIES APPEAR COUNSEL ARGUE MOTION TO DISMISS COURT TAKES MOTION UNDER ADVISEMENT THESE PROCEEDINGS WERE TAKEN THIS DATE BY ALISA OLEARY COURT REPORTER S/MORAN

* * * * *

6/4/04	REPLY MEMO OF LAW IN FURTHER SUPPORT OF THE PUTNAM DEFTS MOT TO DISMISS, PROP ORDER, W/EXH FILED BY DEFTS PUTNAM MGMT, LLC AND PUTNAM FUNDS.
6/4/04	REPLY TO MEMO IN OPPOSITION TO MOTION TO DISMISS; AND OPPOSITION TO ALT MOT FOR LEAVE TO AMND THE COMPL AND TO CONDUCT DISCOVERY, PROPOSED ORDER FILED BY DEFT EVERGREEN INTL TRUST

* * * * *

6/25/04	ORDER-THIS COURT FINDS THAT PLTFS HAVE SUFFICIENTLY ALLEGED A DUTY THE BREACH OF SUCH A DUTY AND DAMAGES THIS COURT DENIES DEFTS MOTION TO DISMISS – SO ORDERED – SEE ORDER FOR FURTHER DETAILS S/MORAN C/S

* * * * *

9/9/04	ANSWER, AFFIRMATIVE DEFENSES, CERT. OF SERVICE AND JURY DEMAND FILED BY Defendant PUTNAM FUNDS TRUST A BUSINESS Defendant PUTNAM INVESTMENT MANAGEMENT L

* * * * *

IN THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

Cause No. 03-L-1539

STEVE AND BETH DUDLEY,
INDIVIDUALLY AND ON BEHALF OF ALL OTHERS
SIMILARLY SITUATED,
Plaintiffs,

v.

PUTNAM INTERNATIONAL EQUITY FUND AND
PUTNAM INVESTMENT MANAGEMENT, LLC,
Defendants.

DOCKET PROCEEDINGS

DATE	DOCKET ENTRY
11/10/03	CLASS ACTION (L) Fee $186.00 Amt $50000.01 Plaintiff DUDLEY STEVE INDIVIDUALLY AND Defendant PUTNAM INTERNATIONAL EQUITY FU
	* * * * *
12/15/03	JUDGMENT/REMOVED TO U.S. DISTRICT COURT PURSUANT TO NOTICE OF REMOVAL BEING FILED THIS DATE BY DEFTS PUTNAM Status: U.S. REMOVAL Report: TERMINATED Dec. 15, 2003
	* * * * *

2/25/04	MEMORANDUM AND ORDER – CASE REMANDED TO MADISON CO FILED BY US DISTRICT COURT
2/26/04	Case Reinstated PER REMAND ORDER Status: Open Case Report: REINSTATED Feb 26, 2004
	* * * * *
3/11/04	MOTION TO DISMISS, MEMORANDUM OF LAW W/ATTACHMENTS AND JURY DEMAND FILED BY Defendant PUTNAM INTERNATIONAL EQUITY FU Defendant PUTNAM INVESTMENT MANAGEMENT L Judge: MORAN GEORGE J. Clerk: ND M
	* * * * *
3/12/04	EXHIBITS TO MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS FILED BY Defendant PUTNAM INTERNATIONAL EQUITY FU Defendant PUTNAM INVESTMENT MANAGEMENT L
3/12/04	APPENDIX OF NON-ILLINOIS AUTHORITIES IN SUPPORT OF MOTION TO DISMISS FILED BY Defendant PUTNAM INTERNATIONAL EQUITY FU Defendant PUTNAM INVESTMENT MANAGEMENT L
	* * * * *
3/29/04	MOTION TO DISMISS PLTFS COMPLAINT PURSUANT TO DOCTRINE OF FORUM NON CONVENIENS & MEMO OF LAW IN SUPPORT OF THE MOTION W/EXHIBITS FILED BY DEFTS PUTNAM INVESTMENT MAN-

AGEMENT LLC AND PUTNAM INTERNATIONAL EQUITY FUND

* * * * *

4/21/04 MOTION FOR LEAVE TO SUBSTITUTE THE ORIGINAL AFFIDAVIT OF CHARLES E PORTER TO THE PUTNAME [*sic*] DEFS MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS PURS TO THE DOCTRINE OF FORUM NON CONVENIENS W/ PROPOSED ORDER & PROPOSED AFFIDAVIT OF CHARLES PORTER FILED BY DEFS PUTNAM INVESTMENT MANAGEMENT & PUTNAM INTERNATIONAL EQUITY FUND

* * * * *

5/5/04 ORDER – DOCKET ORDER – CASE CALLED FOR HEARING THIS DATE MAY 5, 2004 ALL PARTIES APPEAR COUNSEL ARGUE MOTION TO DISMISS COURT TAKES MOTION UNDER ADVISEMENT THESE PROCEEDINGS WERE TAKEN THIS DATE BY ALISA OLEARY COURT REPORTER S/MORAN

* * * * *

6/4/04 REPLY MEMO OF LAW IN FURTHER SUPPORT OF THE PUTNAM DEFTS MOT TO DISMISS W/EXH, PROP ORDER FILED BY DEFTS.

* * * * *

6/25/04 ORDER – THIS COURT FINDS THAT PLTFS HAVE SUFFICIENTLY ALLEGED A DUTY THE BREACH OF SUCH A DUTY AND DAMAGES THIS

	COURT DENIES DEFTS MOTION TO DISMISS SO ORDERED – SEE ORDER FOR FURTHER DETAILS S/MORAN C/S
	* * * * *
9/9/04	ANSWER, AFFIRMATIVE DEFENSES, CERT. OF SERVICE AND JURY DEMAND FILED BY Defendant PUTNAM INTERNATIONAL EQUITY FU Defendant PUTNAM INVESTMENT MANAGEMENT L

IN THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

Cause No. 03-L-1540

STEVE AND BETH DUDLEY,
INDIVIDUALLY AND ON BEHALF OF ALL OTHERS
SIMILARLY SITUATED,
Plaintiffs,

v.

PUTNAM INVESTMENT FUNDS AND
PUTNAM INVESTMENT MANAGEMENT, LLC,
Defendants.

DOCKET PROCEEDINGS

DATE	DOCKET ENTRY
11/10/03	CLASS ACTION (L) Fee $186.00 Amt $50000.01 Plaintiff DUDLEY STEVE INDIVIDUALLY AND Defendant PUTNAM INVESTMENT FUNDS
	* * * * *
12/15/03	JUDGMENT/REMOVED TO U.S. DISTRICT COURT PURSUANT TO NOTICE OF REMOVAL BEING FILED THIS DATE, FILED BY DEFTS PUTNAM Status: U.S. REMOVAL Report: TERMINATED Dec 15, 2003
	* * * * *

2/18/04	COPY OF ORDER OF JUDGE MURPHY FILED 1-27-04 REMANDING THIS CASE BACK TO CIRCUIT COURT FILED BY US DISTRICT COURT.
2/18/04	Case Reinstated Status: Open Case Report: REINSTATED Feb 18, 2004
	* * * * *
2/25/04	MEMORANDUM AND ORDER – CASE REMANDED TO MADISON CO FILED BY US DISTRICT COURT (COPY ONLY)
2/26/04	Case Reinstated PER REMAND ORDER Status: Open Case Report: REINSTATED Feb 26, 2004
	* * * * *
3/12/04	APPENDIX OF NON-ILLINOIS AUTHORITIES IN SUPPORT OF MOTION TO DISMISS FILED BY Defendant PUTNAM INVESTMENT FUNDS Defendant PUTNAM INVESTMENT MANAGEMENT L
	* * * * *
3/29/04	MOTION TO DISMISS PLTFS COMPLAINT PURSUANT TO DOCTRINE OF FORUM NON CONVENIENS & MEMO OF LAW IN SUPPORT OF MOTION W/ EXHIBITS FILED DEFTS PUTNAM INVESTMENT MANAGEMENT LLC AND PUTNAM INVESTMENT FUNDS
	* * * * *
4/21/04	MOTION FOR LEAVE TO SUBSTITUTE THE ORIGINAL AFFIDAVIT OF

CHARLES PORTER W/ PROP ORDER AND PROP AFFIDAVIT OF CHARLES PORTER FILED BY DEFTS PUTNAM INVESTMENT MNGT LLC AND PUTNAM INVESTMENT FUNDS

* * * * *

5/5/04 ORDER – DOCKET ORDER – CASE CALLED FOR HEARING THIS DATE MAY 5, 2004 ALL PARTIES APPEAR COUNSEL ARGUE MOTION TO DISMISS COURT TAKES MOTION UNDER ADVISEMENT THESE PROCEEDINGS WERE TAKEN THIS DATE BY ALISA OLEARY COURT REPORTER S/MORAN C/S

* * * * *

6/4/04 REPLY MEMO OF LAW IN FURTHER SUPPORT OF THE PUTNAM DEFTS MOT TO DISMISS W/PROP EXH, PROP ORDER FILED BY DEFTS PUTNAM INVESTMENT MANAGEMENT LLC AND PUTNAM INVESTMENT FUNDS.

6/25/04 ORDER – THIS COURT FINDS THAT PLTFS HAVE SUFFICIENTLY ALLEGED A DUTY THE BREACH OF SUCH A DUTY AND DAMAGES THIS COURT DENIES DEFTS MOTION TO DISMISS SO ORDERED – SEE ORDER FOR FURTHER DETAILS S/MORAN C/S

* * * * *

9/9/04 ANSWER, JURY DEMAND, CERT. OF SERVICE AND AFFIRMATIVE DEFENSES FILED BY Defendant PUTNAM INVESTMENT FUNDS Defendant

PUTNAM INVESTMENT MANAGEMENT L

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IN THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

Cause No. 03-L-1550

GARY VOGELER, INDIVIDUALLY AND
ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Plaintiff,

v.

COLUMBIA ACORN TRUST AND
COLUMBIA WANGER ASSET MANAGEMENT, LP,
Defendants.

DOCKET PROCEEDINGS

DATE	DOCKET ENTRY
11/13/03	CLASS ACTION (L) Fee $186.00 Amt $50000.01 Plaintiff VOGELER GARY INDIVIDUALLY AND Defendant COLUMBIA ACORN TRUST
	* * * * *
12/12/03	JUDGMENT/REMOVED TO U.S. DISTRICT COURT PER NOTICE OF REMOVAL BEING FILED THIS DATE. FILED BY DEFTS COLUMBIA ACORN & COLUMBIA WANGER Status: U.S. REMOVAL Report: TERMINATED Dec 12, 2003
	* * * * *
2/26/04	MEMORANDUM AND ORDER – CASE REMANDED TO MADISON CO FILED BY US DISTRICT COURT

2/26/04	Case Reinstated–PER REMAND ORDER
	Status: Open Case Report: REINSTATED Feb 26, 2004
	* * * * *
3/5/04	MOTION TO STRIKE AND DISMISS COUNTS I AND II OF THE COMPLAINT AND PROPOSED ORDER AND MEMO OF LAW IN SUPPORT FILED BY DEFT COLUMBIA ACORN TRUST
	* * * * *
3/12/04	Motion CH, D, ED, F, L, MR TO TRANSFER VENUE, MEMORANDUM IN SUPPORT Fee $86.00 OF MOTION TO TRANSFER VENUE, MEMORANDUM OF LAW IN SUPPORT OF OF [*sic*] DEF'TS MOTION TO DISMISS, MOTION TO DISMISS, MEMORANDUM OF LAW IN SUPPORT OF COLUMBIAN [*sic*] WANGER ASSET MANAGEMENT MOTION TO DISMISS AND MOTION TO DISMISS FILED BY DEFENDANTS COLUMBIA WANGER ASSET MANAGEMENT AND COLUMBIA ACORN TRUST Judge: MORAN GEORGE J. Clerk:SEF M
	* * * * *
8/3/04	MEMORANDUM IN OPPOSITION TO DEF'T MOTIONS TO DISMISS FILED BY Plaintiff VOGELER GARY INDIVIDUALLY AND
8/5/04	AMENDED MEMO IN OPPOSITION TO DEF'S MOTIONS TO DISMISS FILED BY Plaintiff VOGELER GARY INDIVIDUALLY AND
	* * * * *

8/11/04	REPLY MEMORANDUM IN SUPPORT OF DEFT COLUMBIA ACORN TRUST'S MOTION PURSUANT TO IL CODE OF CIVIL PROCEDURE 5/2-615 TO STRIKE AND DISMISS THE COMPLAINT. FILED BY DEFT COLUMBIA ACORN TRUST
8/11/04	ORDER – DEFTS MOTION TO STAY ALL PROCEEDINGS IS DENIED. DEFTS MOTIONS TO DISMISS ARGUED AND BRIEFED. DEFTS MOTIONS BASED ON PRE-EMPTION ARE TAKEN UNDER ADVISEMENT. ALL OTHER BASES OF DEFTS MOTIONS TO DISMISS ARE DENIED. S/KARDIS C/G
	* * * * *
8/13/04	JOINDER IN COLUMBIA ACORN TRUST'S REPLY IN SUPPORT OF ITS SECTION 2-615 MOTION TO DISMISS COMPLAINT. FILED BY COLUMBIA WANGER ASSET MANAGEMENT
	* * * * *
9/10/04	NOTICE OF INTERLOCUTORY APPEAL FILED BY Defendant COLUMBIA ACORN TRUST Defendant COLUMBIA WANGER ASSET MANAGEME
	* * * * *
11/10/04	MANDATE OF APPELLATE COURT RE: APPEAL DISMISSED
	* * * * *
2/3/05	ORDER – DEFT. COLUMBIA WANGER ASSET MANAGMENT'S [*sic*] MOTOIN [*sic*] TO DISMISS BASED UPON

CLAIMS OF PREEMPTION ARE DENIED. S/KARDIS C/G

2/10/05 ORDER – BY AGREEMENT, ALL PROCEEDINGS IN THIS STATE COURT CASE, INCLUDING THE FILING OF A PLEADING RESPONSIVE TO THE COMPLAINT, WILL BE SUSPENDED FOR A PERIOD OF 120 DAYS. UPON THE CONCLUSION OF THIS 120 DAY PERIOD, THE COURT WILL SCHEDULE A STATUS CONFERENCE, THE PURPOSE OF WHICH WILL BE TO ADVISE THE COURT AS TO TH [*sic*] STATUS OF THE LITIGATION, ANY OTHER PROCEEDINGS RELATED TO IT, AND THE PARTIES' INTENTIONS WITH RESPECT TO THE PROCEEDING. S/KARDIS C/G

* * * * *

6/13/05 APPELLATE COURT ORDER OF MAY 27, 2005 – THE COURT VACATES THE FEBRUARY 12, 2004 REMAND ORDER AND DISMISSES WITH PREJUDICE PLNTFS STATE LAW CLAIMS IN ACCORD WITH THE SEVENTH CIRCUIT'S MANDATE. FURTHER, THE COURT STRIKES PLNTFS AMENDED COMPLAINT AND DENIES AS MOOT PLNTFS MOTION FOR LEAVE TO AMEND THE COMPLAINT. S/ HERNDON

6/13/05 JUDGMENT/DISMISSED

Status: Dismissed Case Report: TERMINATED Jun 13, 2005

6/21/05 NOTICE THAT ORDER REMANDING THIS CASE TO THIS COURT HAS

BEEN VACATED & THAT PLNTS CLAIMS HAVE BEEN DISMISSED W/PREJ FILED BY COLUMBIA ACORN TRUST

IN THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

Cause No. 03-L-2036

AVERY JACKSON, INDIVIDUALLY AND
ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Plaintiffs,

v.

VAN KAMPEN SERIES FUND, INC. AND
VAN KAMPEN INVESTMENT ADVISORY CORP.,
Defendants.

DOCKET PROCEEDINGS

DATE	DOCKET ENTRY
12/18/03	CLASS ACTION (L) Fee $186.00 Amt $50000.01 Plaintiff JACKSON AVERY INDIVIDUALLY AND Defendant VAN KAMPEN SERIES FUND INC
	* * * * *
1/22/04	JUDGMENT/REMOVED TO U.S. DISTRICT COURT – NOTICE OF FILING NOTICE OF REMOVAL FILED BY DEFTS Status: U.S. REMOVAL Report: TERMINATED Jan 22, 2004
4/14/04	ORDER OF US DISTRICT COURT 4/1/04: THE COURT GRANTS PLTF'S MOTION TO REMAND. (DOC. 13). BECAUSE THE COURT LACKS SUBJECT

MATTER JURISDICTION THE COURT REMANDS THIS ACTION TO THE CIRCUIT COURT OF MADISON COUNTY IL. THE COURT DENIES AS MOOT PLTF'S MOTION TO ACCELERATE BRIEFING & HEARING ON MOTION TO REMAND FOR LACK OF SUBJECT MATTER JURISDICTION (DOC. 18). IT IS SO ORDERED. S/US JUDGEM HERNDON

4/14/04 Case Reinstated: SEE 4/1/04 ORDER OF REMAND

Status: Open Case Report: REINSTATED Apr 14, 2004

* * * * *

5/17/04 Motion CH, D, ED, F, L, MR (MOTION TO DISMISS) MEMO OF LAW, Fee $86.00 FILED BY Defendant VAN KAMPEN SERIES FUND INC Defendant VAN KAMPEN INVESTMENT ADVISORY Judge: BYRON NICHOLAS G. Clerk:MS M

* * * * *

6/25/04 MEMO IN OPPOSITION TO DEFTS' MOTION TO DISMISS AND IN THE ALTERNATIVE MOTION FOR LEAVE TO AMEND THE COMPLAINT AND TO CONDUCT DISC W/EXHIBITS FILED BY PLTF

* * * * *

7/30/04 REPLY IN SUPPORT OF THEIR MOT TO DISMISS FILED BY Defendant VAN KAMPEN SERIES FUND INC

* * * * *

8/10/04 ORDER THIS CAUSE COMING ON FOR HEARING ON DEFTS' MOTION FOR STAY OF PROCEEDINGS AND DEFTS' MOTION TO DISMISS AND, AFTER ARGUEMENT [*sic*] OF COUNSEL THE COURT DENIES SAID MOTIONS. PLTF IS GRANTED LEAVE TO FILE TRIAL COURT ORDERS IN OTHER CASES AS GROUP EXHIBIT #1. S/BYRON C/S TKC

* * * * *

9/28/04 COPY OF ORDER FROM U.S. COURT OF APPEALS ISSUING A STAY OF DISCOVERY IN THIS CASE PENDING OUTCOME OF DEFTS APPEAL. S/DAVID R HERNDON US COURT OF APPEALS JUDGE

* * * * *

10/8/04 ORDER THE CAUSE COMING BEFORE THE COURT ON PLTF'S MOTION TO COMPEL. THE COURT HEREBY CONTINUES HEARING ON SAID MOTION GENERALLY, PURSUANT TO A STAY OF DISC ORDERED BY THE UNITED STATES COURT OF APPEALS FOR THE 7TH CIRCUIT. HEARING TO BE RESET BY REQUEST AT THE APPROPRIATE TIME. S/BYRON C/S TKC

* * * * *

5/31/05 COPY FROM US DISTRICT COURT – THE COURT VACATES THE 04/01/04 REMAND ORDER AND DISMISSES WITH PREJ PLTFS STATE LAW CLAIMS IN ACCORD WITH THE SEVENTH CIRCUITS MANDATE FUR-

THER THE COURT STRIKES PLTFS AMENDED COMPLAINT AND DENIES AS MOOT PLTFS MOTION FOR LEAVE TO AMEND THE COMPLAINT FILED BY U S DISTRICT COURT – JUDGE DAVID HERNDON

IN THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

Cause No. 04-L-241

TERRY SPURGEON, AS CUSTODIAN FOR THE BENEFIT OF JAMES E. SPURGEON, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Plaintiff,

v.

PACIFIC LIFE INSURANCE COMPANY,
Defendant.

DOCKET PROCEEDINGS

DATE	DOCKET ENTRY
3/12/04	CLASS ACTION (L) Fee $186.00 Amt $50000.01 Plaintiff SPURGEON TERRY AS CUSTODIAN FO Defendant PACIFIC LIFE INSURANCE COMPANY
	* * * * *
5/21/04	NOTICE OF REMOVAL FILED BY Defendant PACIFIC LIFE INSURANCE COMPANY
5/21/04	ACKNOWLEDGEMENT OF FILING OF NOT OF REMOVAL W/CLERK OF STATE COURT FILED BY Defendant PACIFIC LIFE INSURANCE COMPANY
5/21/04	JUDGMENT/REMOVED TO U.S. DISTRICT COURT

Status: U.S. REMOVAL Report: TERMINATED May 21, 2004

* * * * *

6/30/04 ORDER FROM UNITED STATES DISTRICT COURT RE: CAUSE REMANDED BACT [*sic*] TO MADISON COUNTY S/REAGAN

6/30/04 Case Reinstated (SEE ORDER THIS DATE FROM DISTRICT COURT)

Status: Open Case Report: REINSTATED Jun 30, 2004

7/1/04 Motion CH, D, ED, F, L, MR TO DISMISS PLTFS COMPLAINT, MEMORANDUM OF LAW Fee $86.00 IN SUPPORT OF DEFS MOTION TO DISMISS PLTFS COMPLAINT & AFFIDAVIT OF NANCY KNOLLE IN SUPPORT OF DEFS MOTION TO DISMISS W/EXHIBITS FILED BY DEF PACIFIC LIFE INSURANCE CO Judge: BYRON NICHOLAS G. Clerk:SP M

* * * * *

9/1/04 MOTION FOR LEAVE TO AMEND, PROPOSED ORDER, PROPOSED FIRST AMENDED COMPLAINT & MEMO IN OPPOSITION TO DEFTS MOTION TO DISMISS W/EXHIBITS FILED BY PLTF

9/8/04 ANSWER TO PLTF'S COMPLAINT FILED BY Defendant PACIFIC LIFE INSURANCE COMPANY

9/8/04 NOTICE OF ITS WITHDRAWAL OF ITS MOTION TO DISMISS FILED BY Defendant PACIFIC LIFE INSURANCE COMPANY

* * * * *

10/8/04	ORDER PLTF'S MOTION FOR LEAVE TO FILE FIRST AMENDED COMPLAINT PRESENTED, CONSIDERED AND ALLOWED. DEFT IS HEREBY GRANTED 30 DAYS TO FILE ITS RESPONSIVE PLEADING TO PLTF'S FIRST AMENDED COMPLAINT.
11/3/04	NOTICE OF STAY OF ORDER OF REMAND FILED BY Defendant PACIFIC LIFE INSURANCE COMPANY

* * * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS
EAST ST. LOUIS

Civil No. 03-CV-673-DRH

T.K. PARTHASARATHY, ET AL.,
INDIVIDUALLY AND ON BEHALF OF ALL OTHERS
SIMILARLY SITUATED,
Plaintiffs,

v.

T. ROWE PRICE INTERNATIONAL FUNDS, INC., ET AL.,
Defendants.

DOCKET PROCEEDINGS

DATE	#	DOCKET ENTRY
10/16/03	1	NOTICE OF REMOVAL from Madison County State Court; Case Number: 03-L-1253 (trb) (Entered: 10/21/2003)
10/16/03	2	FIRST AMENDED COMPLAINT (copy of) Filing fee pd $150.00 receipt #300 92604 (trb) (Entered: 10/21/2003)
10/16/03	3	NOTICE by defendants T. Rowe Price Intl. Funds, T. Rowe Price Intl. Inc., Aim Intl. Funds, Inc. and Aim Advisors, Inc. of filing removal notice (trb) Modified on 10/23/2003 (Entered: 10/21/2003)
		* * * * *
10/21/03		LETTER advising all parties of removal and case number assigned (trb) (Entered: 10/21/2003)

* * * * *

10/21/03	12	ANSWER with Affirmative Defenses by Defendants T Rowe Price Funds, T Rowe Price Intl to the First Amended Complaint [2-1] (js) (Entered: 10/28/2003)
10/21/03	13	ANSWER with Affirmative Defenses by defendants Aim Intl Funds Inc, Aim Advisors Inc to the First Amended Complaint [2-1] (js) (Entered: 10/28/2003)

* * * * *

10/23/03	16	CONSENT TO REMOVAL by defendant Artisan Funds Inc, defendant Artisan Partners Ltd (myz) (Entered: 10/28/2003)

* * * * *

11/20/03	34	MOTION by plaintiffs' T K Parthasarathy, Edmund Woodbury, Stuart Allen Smith, Sharon Smith to remand for lack of subject matter jurisdiction (tjh) (Entered: 11/21/2003)
11/20/03	35	MEMORANDUM by plaintiffs' T K Parthasarathy, Edmund Woodbury, Stuart Allen Smith, Sharon Smith in support of motion to remand for lack of subject matter jurisdiction [34-1] (tjh) (Entered: 11/21/2003)

* * * * *

11/24/03	39	MOTION by defendant Artisan Funds Inc, defendant Artisan Partners Ltd to dismiss (tjh) (Entered: 12/03/2003)
11/24/03	40	MEMORANDUM by defendants' Artisan Funds Inc, Artisan Partners Ltd in support of motion to dismiss [39-1] (tjh) (Entered: 12/03/2003)

* * * * *

12/22/03	50	MEMORANDUM by Artisan Funds Inc, Artisan Partners Ltd in opposition to motion to remand for lack of subject matter jurisdiction [34-1] (tjh) (Entered: 12/30/2003)
12/23/03	51	JOINT MEMORANDUM by defendants T Rowe Price Funds, T Rowe Price Intl, Aim Intl Funds Inc, Aim Advisors Inc in opposition to motion to remand for lack of subject matter jurisdiction [34-1] (js) (Entered: 12/31/2003)
1/5/04	53	NOTICE (MOTION) by defendant Artisan Funds Inc, defendant Artisan Partners Ltd to substitute memorandum in opposition (tjh) (Entered: 01/09/2004)

* * * * *

1/12/04	57	ORDER by Judge David R. Herndon granting motion to substitute memorandum in opposition [53-1] (cc: all counsel) (tjh) (Entered: 01/15/2004)
1/12/04	58	MEMORANDUM by defendant Artisan Funds Inc, defendant Artisan Partners Ltd in opposition to motion to remand for lack of subject matter jurisdiction [34-1] (tjh) (Entered: 01/15/2004)

* * * * *

1/20/04	59	REPLY to Response to Motion re [34] Motion to Remand filed by T K Parthasarathy. (Barash, Eugene) (Entered: 01/20/2004)
1/20/04	60	Second MOTION to Amend/Correct 2 Complaint by T K Parthasarathy. (Barash, Eugene) (Entered: 01/20/2004)

* * * * *

1/23/04	63	ORDER denying 60 Motion to Amend/ Correct complaint. Signed by Judge Clifford J. Proud on 1/23/04. (amv,) (Entered: 01/23/2004)

* * * * *

1/23/04	65	MOTION to Strike *"Second Amended Compalint" [sic]*: Rule 15 FRCP by Aim Advisors Inc, Aim International Funds Inc, T Rowe Price International Funds Inc, T Rowe Price International Inc. Responses due by 2/23/2004 (Gundlach, Frank) (Entered: 01/23/2004)
1/23/04	66	MEMORANDUM IN SUPPORT OF 2255 PETITION 65 Motion to Strike by Aim Advisors Inc, Aim International Funds Inc, T Rowe Price International Funds Inc, T Rowe Price International Inc *(Memorandum In Support of Motion of T. Rowe Price and AIM Defendants to Strike Plaintiffs' "Second Amended Complaint").* (Gundlach, Frank) (Entered: 01/23/2004)
1/23/04	67	NOTICE by T K Parthasarathy re [34] Motion to Remand (Attachments: # 1 Exhibit January 23rd Order) (Barash, Eugene) (Entered: 01/23/2004)
1/28/04	68	ORDER denying as moot 65 Motion to Strike. Signed by Judge Clifford J. Proud on 1/27/04. (amv,) (Entered: 01/28/2004)

* * * * *

1/28/04	70	RESPONSE to 67 Notice (Other) *by T.K. Parthasarathy re: Motion to Remand* filed by Artisan Funds Inc, Artisan Partners Limited Partnership. (Wells, Regina) (Entered: 01/28/2004)

1/30/04	71	ORDER OF REMAND: Case remanded to Madison County, Illinois Circuit Court. Signed by Judge David R Herndon on 1/30/04. (mlm) (Entered: 01/30/2004)
2/2/04	72	Letter of remand to Third Judicial Circuit, Madison County, IL (dmw) (Entered: 02/02/2004)
3/1/04	73	NOTICE OF APPEAL by Artisan Funds Inc. (Shultz, Robert) (Entered: 03/01/2004)

* * * * *

3/22/04	78	USCA Case Number 04-1628 for 73 Notice of Appeal filed by Artisan Funds Inc. (dmw) (Entered: 03/22/2004)

* * * * *

5/11/05	87	MANDATE of USCA as to 73 Notice of Appeal filed by Artisan Funds Inc; the judgment of the District Court is REVERSED, with costs, and the case is remanded with instructions to undo the remand orders and dismiss plaintiffs' state-law claims. (tjh) (Entered: 05/18/2005)

* * * * *

5/13/05	83	NOTICE by T K Parthasarathy *of Filing of Amended Complaint* (King, Robert) (Entered: 05/13/2005)
5/13/05	84	AMENDED COMPLAINT against Artisan Funds Inc, Artisan Partners Limited Partnership, filed by T K Parthasarathy. (King, Robert) (Entered: 05/13/2005)
5/13/05	85	First MOTION to Amend/Correct by T K Parthasarathy. (King, Robert) (Entered: 05/13/2005)

5/13/05	86	MEMORANDUM in Support re 85 First MOTION to Amend/Correct *in the Alternative to Notice of Filing of Amended Complaint as of Right* filed by T K Parthasarathy. (King, Robert) (Entered: 05/13/2005)
5/27/05	88	ORDER DISMISSING CASE. The Court vacates the 1/30/2004 remand Order 71 and dismisses with prejudice Plaintiffs' state law claims in accord with the Seventh Circuit's mandate 87. Further, the Court strikes 84 Plaintiffs' amended complaint and denies as moot Plaintiffs' 85 motion for leave to amend the complaint. See Order for specifics. Signed by Judge David R Herndon on 5/27/2005. (mlm) (Entered: 05/27/2005)

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6/10/05	90	MOTION to Alter Judgment by T K Parthasarathy, Edmund Woodbury, Stuart Allen Smith, Sharon Smith. (King, Robert) (Entered: 06/10/2005)
6/10/05	91	MEMORANDUM in Support re 90 MOTION to Alter Judgment filed by T K Parthasarathy, Edmund Woodbury, Stuart Allen Smith, Sharon Smith. (King, Robert) (Entered: 06/10/2005)
6/23/05	92	MEMORANDUM in Opposition re 90 MOTION to Alter Judgment filed by Aim Advisors Inc, T Rowe Price International Funds Inc, T Rowe Price International Inc, Aim International Funds Inc. (Wood, Lisa) (Entered: 06/23/2005)
7/1/05	93	REPLY to Response to Motion re 90 MOTION to Alter Judgment filed by T K Parthasarathy, Edmund Woodbury,

Stuart Allen Smith, Sharon Smith. (King, Robert) (Entered: 07/01/2005)

7/7/05 94 ORDER denying 90 Motion to Alter Judgment. Signed by Judge David R Herndon on 7/7/2005. (mlm) Modified on 7/8/2005 (mlm). (Entered: 07/08/2005)

8/10/05 95 MOTION for Extension of Time *to file notice of appeal* by T K Parthasarathy, Edmund Woodbury, Stuart Allen Smith, Sharon Smith. (King, Robert) (Entered: 08/10/2005)

8/11/05 96 MEMORANDUM in Support re 95 MOTION for Extension of Time *to file notice of appeal* filed by T K Parthasarathy, Edmund Woodbury, Stuart Allen Smith, Sharon Smith. (Attachments: # 1 Affidavit in Support of Motion)(King, Robert) (Entered: 08/11/2005)

8/12/05 97 MEMORANDUM in Opposition re 95 MOTION for Extension of Time *to file notice of appeal* filed by Aim Advisors Inc, T Rowe Price International Funds Inc, T Rowe Price International Inc, Aim International Funds Inc. (Wood, Lisa) (Entered: 08/12/2005)

8/16/05 98 RESPONSE in Opposition re 95 MOTION for Extension of Time *to file notice of appeal* filed by Artisan Funds Inc, Artisan Partners Limited Partnership. (Attachments: # 1 Exhibit A) (Bozarth, Troy) (Entered: 08/16/2005)

8/17/05 99 REPLY to Response to Motion re 95 MOTION for Extension of Time *to file notice of appeal* filed by T K Parthasarathy, Edmund Woodbury, Stuart Allen Smith, Sharon Smith. (Attachments: # 1 Exhibit

1 (Second Supplemental Declaration of Counsel)# 2 Exhibit 2# 3 Exhibit 3# 4 Exhibit 4# 5 Exhibit 5# 6 Exhibit 6) (King, Robert) (Entered: 08/17/2005)

8/25/05 100 ORDER GRANTING Plaintiffs' Motion for Extension of Time to File Notice of Appeal 95. Plaintiffs shall have up and until Friday, September 2, 2005, to file their notice of appeal. Signed by Judge David R Herndon on 08/25/05. (seg) (Entered: 08/25/2005)

* * * * *

8/27/05 101 TERMINATED PER 103 - NOTICE OF APPEAL of 94 order by T K Parthasarathy, Edmund Woodbury, Stuart Allen Smith, Sharon Smith. (King, Robert) Modified on 8/29/2005 (tjh). (Entered: 08/27/2005)

8/27/05 102 AMENDED NOTICE OF APPEAL 101 of 88 order dismissing case and 94 order denying reconsideration by T K Parthasarathy, Edmund Woodbury, Stuart Allen Smith, Sharon Smith. Filing fee $ 255 due. (King, Robert) Modified on 8/29/2005 (tjh). (Entered: 08/27/2005)

8/29/05 103 NOTICE OF ERRORS AND/OR DEFICIENCIES re 101 Notice of Appeal and 102 Amended Notice of Appeal filed by Sharon Smith, T K Parthasarathy, Edmund Woodbury, Stuart Allen Smith. See attached document for specifics (tjh) (Entered: 08/29/2005)

* * * * *

9/6/05 106 USCA Case Number 05-3548 for 102 Notice of Appeal filed by Sharon Smith, T K Parthasarathy, Edmund Woodbury,

Stuart Allen Smith. (tjh) (Entered: 09/08/2005)

* * * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS
EAST ST. LOUIS

No. 03-CV-691-DRH

CARL KIRCHER AND ROBERT BROCKWAY,
INDIVIDUALLY AND ON BEHALF OF ALL OTHERS
SIMILARLY SITUATED,
Plaintiffs,

v.

PUTNAM FUNDS TRUST, ET AL.,
Defendants.

DOCKET PROCEEDINGS

DATE	#	DOCKET ENTRY
10/23/03	1	NOTICE OF REMOVAL from Madison County State Court; Case Number: 03-L-1255 (trb) (Entered: 10/30/2003)
10/23/03	2	COMPLAINT (copy of) Filing fee pd $150.00 receipt # 300 92791 receipt #300 30092791 (trb) (Entered: 10/30/2003)
		* * * * *
10/23/03	4	NOTICE of filing notice of removal by defendant Putnam Funds Trust, defendant Putnam Investment, defendant Evergreen Intl Trust, defendant Evergreen Invst Mgt (trb) (Entered: 11/03/2003)
		* * * * *

11/3/03		LETTER advising all parties of removal and case number assigned (trb) (Entered: 11/4/2003)
		* * * * *
11/21/03	15	MOTION by defendants Putnam Funds Trust and Putnam Investment to stay proceedings pending transfer determination by Judicial Panel on Multidistrict Litigation (dmw) (Entered: 12/01/2003)
11/21/03	16	MEMORANDUM by defendants Putnam Funds Trust and Putnam Investment in support of motion to stay proceedings transfer determination by Judicial Panel on Multidistrict Litigation [15-1] (dmw) Modified on 12/09/2003 (Entered: 12/01/2003)
		* * * * *
12/9/03	19	MOTION by plaintiffs to remand for lack of subject matter jurisdiction (dmw) (Entered: 12/18/2003)
12/9/03	20	MEMORANDUM by plaintiffs in support of motion to remand for lack of subject matter jurisdiction [19-1] (dmw) (Entered: 12/18/2003)
		* * * * *
12/10/03	21	MOTION by plaintiffs to accelerate briefing (to expedite), and for hearing on motion to remand for lack of subject matter jurisdiction (dmw) (Entered: 12/19/2003)
12/10/03	22	MEMORANDUM by plaintiffs in support of motion to accelerate briefing [21-1] and for hearing on motion to remand for lack of subject matter jurisdiction [21-2] (dmw) (Entered: 12/19/2003)

* * * * *

12/12/03 25 BRIEF (MEMORANDUM) by plaintiffs in support of opposition to motion of Putnam defendants for transfer or consolidation pursuant to 28:1407 (dmw) (Entered: 12/22/2003)

12/18/03 26 CORRECTED MOTION by plaintiffs to remand for lack of subject matter jurisdiction (dmw) (Entered: 12/24/2003)

* * * * *

12/23/03 32 OPPOSITION by defendants to motion to accelerate briefing [21-1] and for hearing on motion to remand for lack of subject matter jurisdiction [21-2] (dmw) (Entered: 12/31/2003)

* * * * *

12/23/03 34 ORDER by Judge David R. Herndon granting motion to accelerate briefing [21-1] and denying request for hearing on motion to remand [21-2], motion to remand [19-1] resp due 1/5/04 and reply due 1/9/04 (cc: all counsel) (dmw) (Entered: 12/31/2003)

* * * * *

1/5/04 39 ORDER by Judge Michael J. Reagan vacating 12/23/03 order [34-1], motion to remand [19-1] & [26-1] resp due 1/17/04 (cc: all counsel) (dmw) (Entered: 01/09/2004)

* * * * *

1/8/04 40 MEMORANDUM by Putnam Funds Trust, Putnam Investment in opposition to plaintiffs' motion to remand for lack of

subject matter jurisdiction [19-1], and [26-1] (js) (Entered: 01/14/2004)

* * * * *

1/23/04	50	NOTICE by Carl Kircher re [19] Motion to Remand (Attachments: # 1 Exhibit January 23rd order) (Barash, Eugene) (Entered: 01/23/2004)
1/27/04	51	ORDER OF REMAND: Case remanded to Madison County, Illinois Circuit Court. GRANTING Motion to Remand filed by Carl Kircher, Robert Brockway (Docs. 19 & 26), DENYING AS MOOT Motion to Stay filed by Putnam Investment Management LLC, Putnam Funds Trust (Doc. 15). Signed by Judge David R Herndon on 1/27/04. (klh) (Entered: 01/27/2004)
1/28/04	52	Letter of remand to Circuit Clerk of Madison County (dmw) (Entered: 01/28/2004)
2/26/04	53	NOTICE OF APPEAL as to 51 Order of Remand,, Terminate Motions, by Putnam Funds Trust, Putnam Investment Management LLC. (Jackson, Rebecca) (Entered: 02/26/2004)

* * * * *

3/4/04	54	USCA Case Number 04-1495 for 53 Notice of Appeal filed by Putnam Investment Management LLC, Putnam Funds Trust. (dmw) (Entered: 03/04/2004)

* * * * *

5/11/05	65	MANDATE of USCA as to 53 Notice of Appeal filed by Putnam Investment Management LLC, Putnam Funds Trust; the judgment of the District Court is REVERSED, with costs, and the case is remanded with instructions to undo

the remand orders and dismiss plaintiffs' state-law claims. (tjh) (Entered: 05/18/2005)

* * * * *

5/13/05	61	NOTICE by Carl Kircher *of Filing of Amended Complaint* (King, Robert) (Entered: 05/13/2005)
5/13/05	62	ENTRY STRICKEN PER 66 5/27/05 ORDER - AMENDED COMPLAINT against Putnam Funds Trust, Putnam Investment Management LLC, filed by Carl Kircher. (King, Robert) Modified on 6/2/2005 (tjh). (Entered: 05/13/2005)
5/13/05	63	First MOTION to Amend/Correct 2 Complaint *In the Alternative to Notice of Filing of Amended Complaint* by Carl Kircher. (King, Robert) (Entered: 05/13/2005)
5/13/05	64	MEMORANDUM in Support re 63 First MOTION to Amend/Correct 2 Complaint *In the Alternative to Notice of Filing of Amended Complaint* filed by Carl Kircher. (King, Robert) (Entered: 05/13/2005)
5/27/05	66	ORDER DISMISSING CASE with prejudice, STRIKING AMENDED COMPLAINT and RENDERING MOOT motion for leave to file amended complaint per the Seventh Circuit's Mandate in Kircher v. Putnam Funds Trust, 403 F.3d 478, 484 (7th Cir. 2005). Signed by Judge David R Herndon on 5/27/05. (klh) (Entered: 05/27/2005)

* * * * *

6/10/05	68	MOTION to Alter Judgment by Carl Kircher, Robert Brockway. (King, Robert) (Entered: 06/10/2005)
6/10/05	69	MEMORANDUM in Support re 68 MOTION to Alter Judgment filed by Carl Kircher, Robert Brockway. (King, Robert) (Entered: 06/10/2005)
6/24/05	70	MEMORANDUM in Opposition re 68 MOTION to Alter Judgment filed by Evergreen International Trust, Evergreen Investment Management Co LLC. (Jackson, Rebecca) (Entered: 06/24/2005)
7/1/05	71	REPLY to Response to Motion re 68 MOTION to Alter Judgment filed by Carl Kircher, Robert Brockway. (King, Robert) (Entered: 07/01/2005)
7/11/05	72	ORDER denying 68 Motion to Alter Judgment. Signed by Judge David R Herndon on 7/7/05. (klh) (Entered: 07/11/2005)
8/10/05	74	NOTICE OF APPEAL by Carl Kircher, Robert Brockway. (King, Robert) Text modified on 8/11/2005 (car). (Entered: 08/10/2005)

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8/18/05	79	USCA Case Number 05-3389 for 74 Notice of Appeal filed by Carl Kircher, Robert Brockway. (dmw) (Entered: 08/18/2005)

* * * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS
EAST ST. LOUIS

No. 03-CV-692-DRH

ROBERT POTTER, ET AL.,
INDIVIDUALLY AND ON BEHALF OF ALL OTHERS
SIMILARLY SITUATED,
Plaintiffs,

v.

JANUS INVESTMENT FUND, ET AL.,
Defendants.

DOCKET PROCEEDINGS

DATE	#	DOCKET ENTRY
10/23/03	1	NOTICE OF REMOVAL from Madison County State Court Case Number: 03-L-1254 (jmp) Modified on 10/24/2003 (Entered: 10/24/2003)
10/23/03	2	COMPLAINT (copy of) Filing fee pd $150.00 receipt # 300 92833 (jmp) Modified on 10/24/2003 (Entered: 10/24/2003)
		* * * * *
10/24/03		LETTER to all attorneys of record advising of removal and case number (jmp) (Entered: 10/24/2003)
		* * * * *
10/30/03	9	JOINDER by defendant Janus Investment Fd in Janus motion to stay proceed-

ings pending transfer decision by Judicial Panel on Multidistrict Litigation (no such motion found) AND MOTION for enlargement of time to respond to the complaint (dmw) Modified on 11/06/2003 (Entered: 11/06/2003)

* * * * *

12/9/03	26	MOTION by plaintiffs to remand for lack of subject matter jurisdiction (dmw) (Entered: 12/18/2003)
12/9/03	27	MEMORANDUM by plaintiffs in support of motion to remand for lack of subject matter jurisdiction [26-1] (dmw) (Entered: 12/18/2003)
12/9/03	28	MOTION by plaintiffs to accelerate briefing (to expedite), and for hearing on motion to remand for lack of subject matter jurisdiction (dmw) (Entered: 12/18/2003)
12/9/03	29	MEMORANDUM by plaintiffs in support of motion to accelerate briefing [28-1] and for hearing on motion to remand for lack of subject matter jurisdiction [28-2] (dmw) (Entered: 12/18/2003)
12/18/03	30	MEMORANDUM AND ORDER by Judge David R. Herndon Case consolidated 3:03-cv-692 with member case 3:03-cv-693 (cc: all counsel) (dmw) (Entered: 12/29/2003)
12/18/03	31	MEMORANDUM AND ORDER by Judge David R. Herndon denying motion to stay [9-1] in 03-CV-693-DRH, granting motions for enlargement of time to respond to complaint [19-1], [20-1], [23-1] in 3:03-cv-00692 and [12-1] in 3:03-cv-00693, denying as moot motion to consolidate cases [23-2] in 3:03-cv-00692, granting motion

for extension of time to respond to Scudder defendants' motions to sever and transfer [25-1] in 3:03-cv-00692 – Court extends plaintiffs' time to respond until 10 days after date of order ruling on motion to remand (cc: all counsel) (dmw) (Entered: 12/29/2003)

* * * * *

1/8/04	42	OPPOSITION by defendants Deutsche Inv Mgmt and Scudder Intl Fund to motion to remand for lack of subject matter jurisdiction [26-1] (dmw) (Entered: 01/14/2004)
1/8/04	43	MEMORANDUM by defendants Janus Investment Fd, Janus Capital Mgmt in opposition to motion to remand for lack of subject matter jurisdiction [26-1] (js) (Entered: 01/15/2004)

* * * * *

1/23/04	46	NOTICE by Dorothy Luettinger re [26] Motion to Remand (Attachments: # 1 Exhibit January 23rd order) (Barash, Eugene) (Entered: 01/23/2004)
1/27/04	47	REPLY to Response to Motion re [26] Motion to Remand *Response to Janus Defendants' Memorandum in Opposition* filed by Robert Potter. (Barash, Eugene) (Entered: 01/27/2004)
1/27/04	48	REPLY to Response to Motion re [26] Motion to Remand *Reply to Scudder's memorandum in opposition to remand* filed by Robert Potter. (Barash, Eugene) (Entered: 01/27/2004)

* * * * *

1/28/04	49	REPLY to Response to Motion re [26] Motion to Remand *Janus Defendants' Reply to Plaintiffs' Citation of Supplemental Authority in Support of Plaintiffs' Motion to Remand* filed by Janus Capital Management LLC, Janus Investment Fund. (Broom, Gordon) (Entered: 01/28/2004)

* * * * *

1/29/04	52	RESPONSE to Motion re [26] Motion to Remand *Scudder Defendants' Response to Plaintiffs' Citation of Supplemental Authority in Support of Plaintiffs' Motion to Remand* filed by Deutsche Investment Management Americas Inc, Scudder International Fund Inc. (Hunsaker, Richard) (Entered: 01/29/2004)
2/2/04	54	MOTION to Dismiss *Pursuant to Fed. R.Civ.P. 12(b)(6)* by Janus Capital Management LLC, Janus Investment Fund. Responses due by 3/3/2004 (Meadows, Gary) (Entered: 02/02/2004)
2/2/04	55	MEMORANDUM in Support re 54 MOTION to Dismiss *Pursuant to Fed. R.Civ.P. 12(b)(6)* filed by Janus Capital Management LLC, Janus Investment Fund. (Attachments: # 1 Appendix to Memorandum in Support of the Janus Defendants' Motion to Dismiss) (Meadows, Gary) (Entered: 02/02/2004)
2/2/04	56	MOTION to Dismiss *Complaint* by Deutsche Investment Management Americas Inc, Scudder International Fund Inc. Responses due by 3/3/2004 (Hunsaker, Richard) Modified on 2/3/2004 (dmw). (Entered: 02/02/2004)

2/2/04	57	MEMORANDUM in Support re 56 MOTION to Dismiss *Complaint* filed by Deutsche Investment Management Americas Inc, Scudder International Fund Inc. (Hunsaker, Richard) (Entered: 02/02/2004)
2/9/04	58	ORDER OF REMAND: Case remanded to Circuit Court of Madison County, Illinois. Granting [26] Motion to Remand filed by Dorothy Luettinger, Robert Potter. All other pending motions are Denied as moot. Signed by Judge David R Herndon on 02/09/2004. (mbf) (Entered: 02/09/2004)
2/10/04	59	Letter to Madison County Clerk advising of remand (dmw) (Entered: 02/10/2004)
3/10/04	60	NOTICE OF APPEAL as to 58 Order of Remand, Terminate Motions by Janus Capital Management LLC, Janus Investment Fund. (Meadows, Gary) (Entered: 03/10/2004)
3/10/04	61	NOTICE OF APPEAL by Deutsche Investment Management Americas Inc, Scudder International Fund Inc. (Hunsaker, Richard) (Entered: 03/10/2004)

* * * * *

3/23/04	66	ORDER vacating conditional transfer order. Signed by Judicial Panel on Multidistrict Litigation on 3/17/04. (dmw) (Entered: 03/23/2004)
3/23/04	67	USCA Case Number 04-1651 for 60 Notice of Appeal filed by Janus Investment Fund, Janus Capital Management LLC. (dmw) (Entered: 03/23/2004)

3/23/04	68	USCA Case Number 04-1650 for 61 Notice of Appeal filed by Scudder International Fund Inc, Deutsche Investment Management Americas Inc. (dmw) (Entered: 03/23/2004)

* * * * *

5/11/05	79	MANDATE of USCA as to 60 Notice of Appeal filed by Janus Investment Fund, Janus Capital Management LLC and 61 Notice of Appeal filed by Scudder International Fund Inc, Deutsche Investment Management Americas Inc; the judgment of the District Court is REVERSED, with costs, and the case is remanded with instructions to undo the remand orders and dismiss plaintiffs' state-law claims. (tjh) (Entered: 05/18/2005)

* * * * *

5/13/05	75	NOTICE by Edna Grench, Dorothy Luettinger, Robert Potter *of Filing of Amended Complaint as of Right* (King, Robert) (Entered: 05/13/2005)
5/13/05	76	ENTRY STRICKEN PER 80 5/27/05 ORDER - AMENDED COMPLAINT against all defendants, filed by Edna Grench, Dorothy Luettinger, Robert Potter. (King, Robert) Modified on 6/2/2005 (tjh). (Entered: 05/13/2005)
5/13/05	77	First MOTION to Amend/Correct 2 Complaint *in the Alternative to Notice of Filing of Amended Complaint as of Right* by Edna Grench, Dorothy Luettinger, Robert Potter. (King, Robert) (Entered: 05/13/2005)
5/13/05	78	MEMORANDUM in Support re 77 First MOTION to Amend/Correct 2 Complaint

		in the Alternative to Notice of Filing of Amended Complaint as of Right filed by Edna Grench, Dorothy Luettinger, Robert Potter. (King, Robert) (Entered: 05/13/2005)
5/27/05	80	ORDER DISMISSING CASE. The Court VACATES the February 12, 2004 remand Order 58 and DISMISSES with prejudice Plaintiffs' state law claims in accord with the Seventh Circuit's mandate. Further, the Court STRIKES Plaintiffs' amended complaint 76 and DENIES as moot Plaintiffs' motion for leave to amend the complaint 77. Signed by Judge David R Herndon on 5/27/2005. (mbf) (Entered: 05/27/2005)
6/27/05	81	NOTICE OF APPEAL by Edna Grench, Dorothy Luettinger, Robert Potter. (King, Robert) (Entered: 06/27/2005)

* * * * *

7/1/05	85	USCA Case Number 05-2895 for 81 Notice of Appeal filed by Dorothy Luettinger, Robert Potter, Edna Grench. (myz) (Entered: 07/06/2005)

* * * * *

7/13/05	88	ORDER of USCA as to 81 Notice of Appeal filed by Dorothy Luettinger, Robert Potter, Edna Grench. Consolidating for briefing and disposition appeals 05-2895, 05-2896, 05-2911 and 05-2912. (jep) (Entered: 07/15/2005)

* * * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS
EAST ST. LOUIS

No. 03-CV-693-DRH

ROBERT POTTER, ET AL.,
INDIVIDUALLY AND ON BEHALF OF ALL OTHERS
SIMILARLY SITUATED,
Plaintiffs,

v.

JANUS INVESTMENT FUND, ET AL.,
Defendants.

DOCKET PROCEEDINGS

DATE	#	DOCKET ENTRY
10/23/03	1	NOTICE OF REMOVAL from Madison County State Court Case Number: 03-L-1254 (jmp) (Entered: 10/29/2003)
10/23/03	2	COMPLAINT (copy of) Filing fee pd $150.00 receipt # 300 92834 (jmp) (Entered: 10/29/2003)
10/23/03	3	CONSENT TO REMOVAL by defendant Janus Capital Mgmt (jmp) (Entered: 10/29/2003)
		* * * * *
10/23/03	9	MOTION by defendant Janus Capital Mgmt to stay proceedings pending a transfer decision by the Judicial Panel on Multidistrict Litigation (jmp) (Entered: 10/30/2003)

10/23/03	10	NOTICE of Filing of Notice of Removal by defendant Janus Capital Mgmt (jmp) (Entered: 10/30/2003)

* * * * *

10/28/03	6	CONSENT TO REMOVAL by defendant Scudder Intl Fund, defendant Deutsche Inv Mgmt AM (jmp) (Entered: 10/29/2003)

* * * * *

12/2/03	16	JOINDER by defendant Janus Investment Fd in Janus Capital Management's Motion to Stay, Request for Extension of Time, and Joint Request that all filings in the case captioned "Potter v. Janus Investment Fund, et al.," be Filed under a Single Cause Number (js) (Entered: 12/11/2003)

* * * * *

12/18/03	18	MEMORANDUM AND ORDER by Judge David R. Herndon Case consolidated with 03-693-DRH (cc: all counsel) (dmw) (Entered: 12/29/2003)
12/18/03		MEMORANDUM AND ORDER by Judge David R. Herndon denying motion to stay [9-1] in 03-CV-693-DRH, granting motions for enlargement of time to respond to complaint [19-1], [20-1], [23-1] in 3:03-cv-00692 and [12-1] in 3:03-cv-00693, denying as moot motion to consolidate cases [23-2] in 3:03-cv-00692, granting motion for extension of time to respond to Scudder defendants' motions to sever and transfer [25-1] in 3:03-cv-00692 Court extends plaintiffs' time to respond until 10 days after date of order ruling on mo-

tion to remand (cc: all counsel) (dmw) (Entered: 12/29/2003)

* * * * *

12/23/03 JOINT OPPOSITION by defendants to motion to accelerate briefing [28-1] and for hearing on motion to remand [28-2] (dmw) (Entered: 12/31/2003)

* * * * *

1/8/04 OPPOSITION by defendants Deutsche Inv Mgmt and Scudder Intl Fund to motion to remand for lack of subject matter jurisdiction [26-1] (dmw) (Entered: 01/14/2004)

1/8/04 MEMORANDUM by defendants Janus Investment Fd, Janus Capital Mgmt in opposition to motion to remand for lack of subject matter jurisdiction [26-1] (js) (Entered: 01/15/2004)

* * * * *

2/9/04 ORDER OF REMAND: Case remanded to Madison County. See order at doc 58 in lead case number 03-692-DRH. Signed by Judge David R Herndon on 2/9/04. (dmw) (Entered: 02/11/2004)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS
EAST ST. LOUIS

No. 03-CV-843-DRH

GARY VOGELER,
INDIVIDUALLY AND ON BEHALF OF ALL OTHERS
SIMILARLY SITUATED,
Plaintiff,

v.

COLUMBIA ACORN TRUST, ET AL.,
Defendants.

DOCKET PROCEEDINGS

DATE	#	DOCKET ENTRY
12/12/03	1	NOTICE OF REMOVAL from Madison County State Court; Case Number: 03-L-1550 (trb) (Entered: 12/17/2003)
12/12/03	2	COMPLAINT (copy of) Filing fee pd $ 150.00 receipt # 300 93971 (trb) Modified on 12/17/2003 (Entered: 12/17/2003)
12/12/03	3	NOTICE by defendant Columbia Acorn Trust, defendant Columbia Wanger LP of filing notice of removal (trb) (Entered: 12/17/2003)
		* * * * *
12/18/03		LETTER advising all parties of removal and case number assigned (trb) (Entered: 12/18/2003)

* * * * *

1/16/04	15	MOTION to Dismiss by Columbia Acorn Trust. Responses due by 2/16/2004 (tjh) (Entered: 01/17/2004)
1/16/04	16	MEMORANDUM in Support re 15 MOTION to Dismiss filed by Columbia Acorn Trust. (tjh) (Entered: 01/17/2004)

* * * * *

1/28/04	19	MOTION to Dismiss *Plaintiff's Complaint* by Columbia Wanger Asset Management LP. Responses due by 2/27/2004 (Attachments: # 1 # (2)proposed order) (Santangelo, Jon) Notice of errors added on 2/17/2004 (tjh). Modified on 2/17/2004 (tjh). (Entered: 01/28/2004)
1/28/04	20	MEMORANDUM in Support re 19 MOTION to Dismiss *Plaintiff's Complaint* filed by Columbia Wanger Asset Management LP. (Santangelo, Jon) (Entered: 01/28/2004)

* * * * *

2/9/04	23	MOTION to Remand by Gary Vogeler. (Attachments: # 1) (Barash, Eugene) Additional attachment(s) added on 2/18/2004 (tjh,). (Entered: 02/09/2004)
2/9/04	24	MEMORANDUM in Support re 23 MOTION to Remand filed by Gary Vogeler. (Attachments: # 1 Exhibit # 2 Exhibit # 3 Exhibit # 4 Exhibit # 5 Exhibit # 6 Exhibit # 7 Exhibit) (Barash, Eugene) (Entered: 02/09/2004)

* * * * *

2/12/04	28	ORDER OF REMAND: This case is remanded sua sponte to the Circuit Court

of Madison County, Illinois. The Court DENIES as moot 23 the MOTION to Remand filed by Gary Vogeler, 25 the MOTION to Expedite, 15 the MOTION to Dismiss filed by Columbia Acorn Trust, and 19 the MOTION to Dismiss filed by Columbia Wanger Asset Management LP. Signed by Judge David R Herndon on 02/12/2004. (mbf) (Entered: 02/12/2004)

* * * * *

2/18/04	30	NOTICE OF ERRORS AND/OR DEFICIENCIES re 23 Motion to Remand filed by Gary Vogeler. See attached document for specifics (tjh) (Entered: 02/18/2004)
2/25/04	31	Letter from Clerk of Court to Clerk, Madison County Clerk re remand (tjh) (Entered: 02/25/2004)
3/11/04	32	NOTICE OF APPEAL as to 28 Order of Remand,, Terminate Motions, by Columbia Wanger Asset Management LP. (Santangelo, Jon) (Entered: 03/11/2004)
3/11/04	33	NOTICE OF APPEAL as to 28 Order of Remand,, Terminate Motions, by Columbia Acorn Trust. (Wells, Regina) (Entered: 03/11/2004)

* * * * *

3/22/04	37	USCA Case Number 04-1660 for 32 Notice of Appeal filed by Columbia Wanger Asset Management LP. (dmw) (Entered: 03/22/2004)
3/22/04	38	USCA Case Number 04-1661 for 33 Notice of Appeal filed by Columbia Acorn Trust. (dmw) (Entered: 03/22/2004)

* * * * *

5/11/05	49	MANDATE of USCA as to 32 Notice of Appeal filed by Columbia Wanger Asset Management LP and 33 Notice of Appeal filed by Columbia Acorn Trust; the judgment of the District Court is REVERSED, with costs, and the case is remanded with instructions to undo the remand orders and dismiss plaintiffs' state-law claims. (tjh) (Entered: 05/18/2005)

* * * * *

5/13/05	45	NOTICE by Gary Vogeler of *Filing of Amended Complaint As of Right* (King, Robert) (Entered: 05/13/2005)
5/13/05	46	AMENDED COMPLAINT against all defendants, filed by Gary Vogeler. (King, Robert) (Entered: 05/13/2005)
5/13/05	47	First MOTION to Amend/Correct 2 Complaint *In the Alternative to Notice of Filing of Amended Complaint* by Gary Vogeler. (King, Robert) (Entered: 05/13/2005)
5/13/05	48	MEMORANDUM in Support re 47 First MOTION to Amend/Correct 2 Complaint *In the Alternative to Notice of Filing of Amended Complaint* filed by Gary Vogeler. (King, Robert) (Entered: 05/13/2005)
5/27/05	50	ORDER DISMISSING CASE. The Court VACATES the February 12, 2004 remand Order 28 and DISMISSES with prejudice Plaintiffs' state law claims in accord with the Seventh Circuit's mandate. Further, the Court STRIKES Plaintiffs' amended complaint 46 and DENIES as moot Plaintiffs' motion for leave to amend the complaint 47. Signed by Judge David R

		Herndon on 5/27/2005. (mbf) (Entered: 05/27/2005)
6/27/05	51	NOTICE OF APPEAL by Gary Vogeler. Filing fee $ 255. (King, Robert) (Entered: 06/27/2005)
		* * * * *
7/6/05	55	USCA Case Number 05-2912 for 51 Notice of Appeal filed by Gary Vogeler. (myz) (Entered: 07/11/2005)
7/13/05	56	ORDER of USCA as to 51 Notice of Appeal filed by Gary Vogeler. Consolidating for briefing and disposition appeals 05-2895, 05-2896, 05-2911 and 05-2912. (jep) (Entered: 07/15/2005)
		* * * * *
7/18/05	57	ORDER of USCA as to 46 Notice of Appeal filed by Steve Dudley, Beth Dudley consolidating Appeals in 03-692-DRH, 03-852-GPM, 03-853-GPM, 04-56-DRH, and 04-355-MJR. (tjh) (Entered: 07/20/2005)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS
EAST ST. LOUIS

No. 03-CV-852-GPM

STEVE DUDLEY AND BETH DUDLEY,
INDIVIDUALLY AND ON BEHALF OF ALL OTHERS
SIMILARLY SITUATED,
Plaintiffs,

v.

PUTNAM INTERNATIONAL EQUITY FUND, ET AL.,
Defendants.

DOCKET PROCEEDINGS

DATE	#	DOCKET ENTRY
12/15/03	1	NOTICE OF REMOVAL from Madison County State Court Case Number: 03-L-1539 (jmp) (Entered: 12/19/2003)
12/15/03	2	COMPLAINT (copy of) Filing fee pd $150.00 receipt # 300 94015 (jmp) (Entered: 12/19/2003)
		* * * * *
12/15/03	4	NOTICE OF FILING NOTICE OF REMOVAL by plaintiff Steve Dudley, plaintiff Beth Dudley (jmp) (Entered: 12/19/2003)
		* * * * *

12/17/03	5	MOTION by plaintiffs to remand for lack of subject matter jurisdiction (dmw) (Entered: 12/23/2003)
12/17/03	6	MEMORANDUM by plaintiffs in support of motion to remand for lack of subject matter jurisdiction [5-1] (dmw) (Entered: 12/23/2003)
12/17/03	7	MOTION by plaintiffs to accelerate briefing (to expedite), and for hearing on motion to remand for lack of subject matter jurisdiction (dmw) (Entered: 12/23/2003)
12/17/03	8	MEMORANDUM by plaintiffs in support of motion to accelerate briefing [7-1] and for hearing on motion to remand for lack of subject matter jurisdiction [7-2] (dmw) (Entered: 12/23/2003)
12/19/03		LETTER to all attorneys of record advising of removal and case number (jmp) (Entered: 12/19/2003)

* * * * *

1/5/04	15	ORDER by Chief Judge G. P. Murphy granting in part and denying in part motion to accelerate briefing [7-1] and for hearing on motion to remand [7-2], motion to remand [5-1] set for hearing at 3:30 PM on 1/26/04 before Chief Judge G. P. Murphy in the USDC/East St. Louis, IL. If plaintiffs intend to file reply, they should do so by 1/23/04 (cc: all counsel) (dmw) (Entered: 01/10/2004)

* * * * *

1/16/04	18	MEMORANDUM in Opposition re [5] Motion to Remand filed by Putnam International Equity Fund, Putnam Investment Management LLC. (Attach-

ments: # 1 Exhibit A# 2 Exhibit B) (dmw) (Entered: 01/18/2004)

* * * * *

1/23/04 22 NOTICE by Steve Dudley re [5] Motion to Remand (Attachments: # 1 Exhibit January 23rd order) (Barash, Eugene) (Entered: 01/23/2004)

* * * * *

1/27/04 24 ORDER OF REMAND: Case remanded to Third Judicial Circuit, Madison County, IL. GRANTING [5] Motion to Remand filed by Steve Dudley, Beth Dudley. Signed by Judge G. Patrick Murphy on 1/27/04. (lmc) (Entered: 01/27/2004)

1/29/04 26 Letter of remand to Circuit Court, Madison County, IL (dmw)

2/26/04 27 NOTICE OF APPEAL as to 24 Order of Remand, Terminate Motions by Putnam International Equity Fund, Putnam Investment Management LLC. (Jackson, Rebecca) (Entered: 02/26/2004)

* * * * *

3/4/04 28 USCA Case Number 04-1496 for 27 Notice of Appeal filed by Putnam Investment Management LLC, Putnam International Equity Fund. (dmw) (Entered: 03/04/2004)

* * * * *

5/11/05 39 MANDATE of USCA as to 27 Notice of Appeal filed by Putnam Investment Management LLC, Putnam International Equity Fund; the judgment of the District Court is REVERSED, with costs, and the case is remanded with instructions to

undo the remand orders and dismiss plaintiffs' state-law claims. (tjh) (Entered: 05/18/2005)

* * * * *

5/13/05	35	NOTICE by Steve Dudley, Beth Dudley *of Filing of Amended Complaint as of Right* (King, Robert) (Entered: 05/13/2005)
5/13/05	36	AMENDED COMPLAINT against all defendants, filed by Steve Dudley, Beth Dudley. (King, Robert) (Entered: 05/13/2005)
5/13/05	37	First MOTION to Amend/Correct 2 Complaint *in the Alternative to Notice of Filing of Amended Complaint* by Steve Dudley, Beth Dudley. (King, Robert) (Entered: 05/13/2005)
5/13/05	38	MEMORANDUM in Support re 37 First MOTION to Amend/Correct 2 Complaint *in the Alternative to Notice of Filing of Amended Complaint* filed by Steve Dudley, Beth Dudley. (King, Robert) (Entered: 05/13/2005)

* * * * *

6/1/05	41	ORDER DISMISSING CASE pursuant to the Seventh Circuit's May 10, 2005 Mandate 39. The Court's prior Order of remand is "undone", and Plaintiffs' claims are DISMISSED with prejudice. Plaintiffs' first MOTION to Amend/Correct 37 and Defendant's First MOTION for Extension of Time to File Response 40 are DENIED. The Clerk is DIRECTED to enter judgment accordingly and close this case. Signed by Judge G. Patrick Murphy on 06/01/2005. (njr) (Entered: 06/01/2005)

6/1/05	42	JUDGMENT. Signed by Judge G. Patrick Murphy on 06/01/2005. (njr) (Entered: 06/01/2005)
6/27/05	43	NOTICE OF APPEAL by Steve Dudley, Beth Dudley. (King, Robert) (Entered: 06/27/2005)

* * * * *

7/1/05	46	USCA Case Number 05-2896 for 43 Notice of Appeal filed by Steve Dudley, Beth Dudley. (myz) (Entered: 07/06/2005)
7/13/05	48	ORDER of USCA as to 43 Notice of Appeal filed by Steve Dudley, Beth Dudley. Consolidating for briefing and disposition appeals 05-2895, 05-2896, 05-2911 and 05-2912. (jep) (Entered: 07/15/2005)

* * * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS
EAST ST. LOUIS

No. 03-CV-853-GPM

STEVE DUDLEY AND BETH DUDLEY,
INDIVIDUALLY AND ON BEHALF OF ALL OTHERS
SIMILARLY SITUATED,
Plaintiffs,

v.

PUTNAM INVESTMENT FUNDS, ET AL.,
Defendants.

DOCKET PROCEEDINGS

DATE	#	DOCKET ENTRY
12/15/03	1	NOTICE OF REMOVAL from Madison County State Court Case Number: 03-L-1540 (trb) (Entered: 12/19/2003)
12/15/03	2	COMPLAINT (copy of) Filing fee pd $150.00 receipt # 300 94017 (trb) (Entered: 12/19/2003)
12/15/03	3	NOTICE by defendant Putnam Funds, defendant Putnam Investment of filing notice of removal (trb) (Entered: 12/19/2003)
		* * * * *
12/17/03	5	MOTION by plaintiff Steve Dudley, plaintiff Beth Dudley to remand for lack of subject matter jurisdiction (myz) (Entered: 12/24/2003)

12/17/03	6	MEMORANDUM by plaintiffs Steve Dudley, Beth Dudley in support of motion to remand for lack of subject matter jurisdiction [5-1] (myz) (Entered: 12/24/2003)
12/17/03	7	MOTION by plaintiffs Steve Dudley, Beth Dudley to accelerate (expedite) briefing & hearing on motion to remand (myz) (Entered: 12/24/2003)
12/17/03	8	MEMORANDUM by plaintiffs Steve Dudley, Beth Dudley in support of motion to accelerate (expedite) briefing & hearing on motion to remand [7-1] (myz) (Entered: 12/24/2003)
12/19/03		LETTER advising all parties of removal and case number assigned (trb) (Entered: 12/19/2003)

* * * * *

1/5/04	15	(MEMORANDUM) by defendant Putnam Funds, defendant Putnam Investment in opposition to motion to accelerate (expedite) briefing & hearing on motion to remand [7-1] (tjh) (Entered: 01/09/2004)
1/5/04	15	CROSS MOTION by defendant Putnam Funds, defendant Putnam Investment to stay proceedings pending transfer determination by the Judicial Panel on Multidistrict Litigation (tjh) (Entered: 01/09/2004)

* * * * *

1/16/04	19	MEMORANDUM OF LAW in Opposition re [5] Motion to Remand filed by Putnam Investment Funds, Putnam Investment Management LLC. (Attachments: # 1 Exhibit A - Pleadings from Southern

District of Texas# 2 Exhibit B – Pleadings from District of Massachusetts) (tjh) (Entered: 01/18/2004)

* * * * *

1/22/04 21 NOTICE of Hearing on Motion [5] Motion to Remand: Motion Hearing set for 3/15/2004 10:30 AM in East St. Louis Court House before Chief Judge G. Patrick Murphy. (lmc) (Entered: 01/22/2004)

1/22/04 22 ORDER granting [7] Motion to Expedite. The court will hear the motion to remand at the time of hearing on case no. 03-852-GPM on Monday, January 26, 2004 at 3:30 PM. The hearing set March 15, 2004 at 10:30 AM is CANCELED. Signed by Judge G. Patrick Murphy on 1/22/04. (lmc) (Entered: 01/22/2004)

* * * * *

1/23/04 23 NOTICE by Beth Dudley re [5] Motion to Remand (Attachments: # 1 Exhibit January 23rd order) (Barash, Eugene) (Entered: 01/23/2004)

* * * * *

1/27/04 25 ORDER OF REMAND: Case remanded to Third Judicial Circuit, Madison County, IL. GRANTING [5] Motion to Remand filed by Steve Dudley, Beth Dudley. Signed by Judge G. Patrick Murphy on 1/27/04. (lmc) (Entered: 01/27/2004)

2/15/04 27 Letter from Clerk of Court to Clerk, 3rd Judicial Circuit, Madison County, IL re remand (tjh) (Entered: 02/15/2004)

2/17/04 28 NOTICE OF ERRORS AND/OR DEFICIENCIES re 23 Notice (Other) filed by

Beth Dudley. See attached document for specifics (tjh) (Entered: 02/17/2004)

* * * * *

2/26/04 30 NOTICE OF APPEAL as to 25 Order of Remand, Terminate Motions by Putnam Investment Funds, Putnam Investment Management LLC. (Jackson, Rebecca) (Entered: 02/26/2004)

* * * * *

3/18/04 33 USCA Case Number 04-1608 for 30 Notice of Appeal filed by Putnam Investment Management LLC, Putnam Investment Funds. (dmw) (Entered: 03/23/2004)

* * * * *

5/11/05 42 MANDATE of USCA as to 30 Notice of Appeal filed by Putnam Investment Management LLC, Putnam Investment Funds; the judgment of the District Court is REVERSED, with costs, and the case is remanded with instructions to undo the remand orders and dismiss plaintiffs' state-law claims. (tjh) (Entered: 05/18/2005)

5/13/05 38 NOTICE by Steve Dudley, Beth Dudley *of Filing of Amended Complaint as of Right* (King, Robert) (Entered: 05/13/2005)

5/13/05 39 AMENDED COMPLAINT against all defendants, filed by Steve Dudley, Beth Dudley. (King, Robert) (Entered: 05/13/2005)

5/13/05 40 First MOTION to Amend/Correct 2 Complaint *in the Alternative to Notice of Filing of Amended Complaint* by Steve

Dudley, Beth Dudley. (King, Robert) (Entered: 05/13/2005)

5/13/05 41 MEMORANDUM in Support re 40 First MOTION to Amend/Correct 2 Complaint *in the Alternative to Notice of Filing of Amended Complaint* filed by Steve Dudley, Beth Dudley. (King, Robert) (Entered: 05/13/2005)

* * * * *

6/1/05 44 ORDER DISMISSING CASE pursuant to the Seventh Circuit's May 10, 2005 Mandate 42. The Court's prior Order of remand is "undone", and Plaintiffs' claims are DISMISSED with prejudice. Plaintiffs' first MOTION to Amend/Correct 40 and Defendant's First MOTION for Extension of Time to File Response 43 are DENIED. The Clerk is DIRECTED to enter judgment accordingly and close this case. Signed by Judge G. Patrick Murphy on 06/01/2005. (njr) (Entered: 06/01/2005)

6/1/05 45 JUDGMENT. Signed by Judge G. Patrick Murphy on 06/01/2005. (njr) (Entered: 06/01/2005)

6/27/05 46 NOTICE OF APPEAL by Steve Dudley, Beth Dudley. Filing fee $ 255. (King, Robert) (Entered: 06/27/2005)

* * * * *

7/6/05 49 USCA Case Number 05-2911 for 46 Notice of Appeal filed by Steve Dudley, Beth Dudley. (myz) (Entered: 07/11/2005)

7/13/05 50 ORDER of USCA as to 46 Notice of Appeal filed by Steve Dudley, Beth Dudley. Consolidating for briefing and disposition

appeals 05-2895, 05-2896, 05-2911 and 05-2912. (jep) (Entered: 07/15/2005)

* * * * *

7/18/05	51	ORDER of USCA as to 46 Notice of Appeal filed by Steve Dudley, Beth Dudley consolidating Appeals in 03-692-DRH, 03-852-GPM, 03-843-DRH, 04-56-DRH, and 04-355-MJR. (tjh) (Entered: 07/20/2005)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS
EAST ST. LOUIS

No. 04-CV-56-DRH

AVERY JACKSON,
INDIVIDUALLY AND ON BEHALF OF ALL OTHERS
SIMILARLY SITUATED,
Plaintiff,

v.

VAN KAMPEN SERIES FUND INC., ET AL.,
Defendants.

DOCKET PROCEEDINGS

DATE	#	DOCKET ENTRY
1/22/04	1	NOTICE OF REMOVAL by Van Kampen Series Fund Inc and Van Kampen Investment Advisory Corp from Madison County Illinois State Court, case number 03-L-2056. (Filing fee $ 150 paid; receipt #300 94809) (Attachments: # 1 Civil Cover Sheet) (jmp) (Entered: 01/23/2004)
1/22/04	2	COMPLAINT against Van Kampen Series Fund Inc and Van Kampen Investment Advisory Corp, filed by Avery Jackson. (jmp) (Entered: 01/28/2004)
1/28/04	3	Letter to all attorneys of record advising of removal and case number (jmp) (Entered: 01/29/2004)

* * * * *

2/11/04	13	MOTION to Remand by Avery Jackson (Barash, Eugene) Modified on 2/18/2004 (dlr). (Entered: 02/11/2004)
2/11/04	14	MEMORANDUM in Support re 13 MOTION to Remand filed by Avery Jackson. (Attachments: # 1 Exhibit # 2 Exhibit # 3 Exhibit # 4 Exhibit # 5 Exhibit # 6 Exhibit # 7 Exhibit) (Barash, Eugene) (Entered: 02/11/2004)
		* * * * *
3/12/04	17	RESPONSE in Opposition re 13 MOTION to Remand *Defendants' Opposition to Remand* filed by Van Kampen Investment Advisory Corp. (Carey, Jack) (Entered: 03/12/2004)
		* * * * *
4/1/04	20	VACATED - See Court Order of 5/27/05 - ORDER granting 13 Plaintiff's Motion to Remand and denying as moot 18 Plaintiff's Motion to Accelearate [*sic*] Briefing and Hearing on Motion to Remand for Lack of Subject Matter Jurisdiction. This action is REMANDED to the Circuit Court of Madison County, Illinois. Signed by Judge David R Herndon on 4/1/04. (mlm) Modified on 5/31/2005 (myz). (Entered: 04/01/2004)
4/12/04	21	Letter from US District Court to Madison County State Court regarding Order of Remand. (dlr) (Entered: 04/12/2004)
4/30/04	22	NOTICE OF APPEAL as to 20 Order on Motion to Remand,, Order on Motion for Miscellaneous Relief, by Van Kampen Investment Advisory Corp, Van Kampen Series Fund Inc. (Sperling, Robert) (Entered: 04/30/2004)

* * * * *

5/10/04	23	USCA Case Number 04-2162 for 22 Notice of Appeal filed by Van Kampen Series Fund Inc, Van Kampen Investment Advisory Corp. (dlr) (Entered: 05/10/2004)

* * * * *

5/11/05	32	MANDATE of USCA as to 22 Notice of Appeal filed by Van Kampen Series Fund Inc, Van Kampen Investment Advisory Corp; the judgment of the District Court is REVERSED, with costs, and the case is remanded with instructions to undo the remand orders and dismiss plaintiffs' state-law claims. (tjh) (Entered: 05/18/2005)

* * * * *

5/13/05	28	NOTICE by Avery Jackson *of Filing of Amended Complaint as of Right* (King, Robert) (Entered: 05/13/2005)
5/13/05	29	STRICKEN - See Court Order of 5/27/05 - AMENDED COMPLAINT against all defendants, filed by Avery Jackson. (King, Robert) Modified on 5/31/2005 (myz). (Entered: 05/13/2005)
5/13/05	30	First MOTION to Amend/Correct 2 Complaint *in the Alternative to Notice of Filing of Amended Complaint* by Avery Jackson. (King, Robert) (Entered: 05/13/2005)
5/13/05	31	MEMORANDUM in Support re 30 First MOTION to Amend/Correct 2 Complaint *in the Alternative to Notice of Filing of Amended Complaint* filed by

Avery Jackson. (King, Robert) (Entered: 05/13/2005)

5/27/05 33 ORDER DISMISSING CASE: The Court vacates 20 the 4/1/2004 remand Order and dismisses with prejudice Plaintiff's state law claims in accord with the Seventh Circuit's mandate 32. Further, the Court strikes 29 Plaintiff's amended complaint and denies 30 as moot Plaintiff's motion for leave to amend the complaint. Signed by Judge David R Herndon on 5/27/2005. (mlm) (Entered: 05/27/2005)

5/31/05 34 Letter to Madison County State Court regarding Order vacating the Order of Remand. (myz) (Entered: 05/31/2005)

5/31/05 35 Acknowledgement Letter from Madison County State Court regarding order vacating order of remand. (myz) (Entered: 05/31/2005)

6/27/05 36 NOTICE OF APPEAL by Avery Jackson re Order 33 Filing fee $ 255. (King, Robert) Modified on 7/5/2005 (dlr). (Entered: 06/27/2005)

* * * * *

7/15/05 39 USCA Case Number 05-2981 for 36 Notice of Appeal filed by Avery Jackson. (dlr) (Entered: 07/18/2005)

* * * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS
EAST ST. LOUIS

No. 04-CV-355-MJR

TERRY SPURGEON, AS CUSTODIAN FOR THE BENEFIT OF JAMES E. SPURGEON, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Plaintiff,

v.

PACIFIC LIFE INSURANCE COMPANY,
Defendant.

DOCKET PROCEEDINGS

DATE	#	DOCKET ENTRY
5/21/04	1	NOTICE OF REMOVAL by Pacific Life Insurance Company from Madison County State Court, case number 04-L-241. (Filing fee $ 150.00, receipt # 300 97476) (Attachments: # 1 Civil Cover Sheet) (trb.) (Entered: 05/24/2004)
5/21/04	2	COMPLAINT (copy of) against Pacific Life Insurance Company, filed by Terry Spurgeon. (trb.) (Entered: 05/24/2004)
5/24/04	3	NOTICE by Pacific Life Insurance Company re 1 Notice of Removal *Acknowledgement of Filing of Notice of Removal* (Rankin, W.) (Entered: 05/24/2004)
5/24/04	4	NOTICE by Pacific Life Insurance Company re 1 Notice of Removal *Declaration*

of Adrian Griggs (Rankin, W.) (Entered: 05/24/2004)

* * * * *

5/26/04 7 ORDER: Removed on May 21, 2004 by Def Pacific Life, this case comes now before the Court for threshold review. The Court DIRECTS Plaintiff Spurgeon to file a Memorandum (no longer than 10 pages) responding to the jurisdictional allegations contained in the removal notice on or before June 18, 2004. Additionally, the Court DIRECTS each of the parties to file a "Brief Regarding Venue" (no longer than 10 pages, also due June 18, 2004) addressing (a) whether and why venue properly lies in this Judicial District and (b) whether and why transfer to another Judicial District is appropriate under 28 U.S.C. 1404(a) or 1406(a). Signed by Judge Michael J. Reagan on 05/26/04. (soh) (Entered: 05/26/2004)

* * * * *

5/26/04 11 Letter advising all parties of removal and case number assigned. (trb,) (Entered: 05/26/2004)

* * * * *

6/18/04 20 RESPONSE to [7] Order,, *Memorandum responding to jurisdictional allegations contained in the removal notice* filed by Terry Spurgeon. (Attachments: # 1 Exhibit # 2 Exhibit # 3 # 4 Exhibit # 5 Exhibit # 6 Exhibit # 7 Exhibit # 8 Exhibit) (Barash, Eugene) (Entered: 06/18/2004)

* * * * *

6/22/04	24	MOTION for Leave to File *Resonse* [*sic*] *to Plaintiff's Jurisdictional Memorandum* by Pacific Life Insurance Company. (Rankin, W.) (Entered: 06/22/2004)
6/23/04	25	ORDER: The Court hereby GRANTS 24, Pacific Life's Motion for Leave to File a Response (in the nature of a reply brief) on the issue of jurisdiction. Pacific Life shall electronically file its "Response to Plaintiff's Jurisdictional Memorandum" by 6/24/04. (Pacific Life did submit the response with a proposed order sent to the undersigned Judge's proposed document in-box, so the Judge can work off that copy, but Pacific Life still must properly e-file the response.) Signed by Judge Michael J. Reagan on 6/23/04. (soh) (Entered: 06/23/2004)
6/23/04	26	RESPONSE to 20 Response, *to Plaintiff's Jurisdictional Memo* filed by Pacific Life Insurance Company. (Rankin, W.) (Entered: 06/23/2004)
6/24/04	27	MEMORANDUM AND ORDER remanding case to the Circuit Court of Madison County, Illinois because it lacks subject matter jurisdiction. As Spurgeon's counsel did not request such an award in its jurisdictional brief urging remand, the Court declines to charge Pacific Life to removal costs incurred by Spurgeon. Signed by Judge Michael J. Reagan on 6/24/04. (lmb) (Entered: 06/24/2004)
6/28/04	28	Letter to Madison County State Court regarding Order of Remand. (dlr) Entered: 06/28/2004)
7/1/04	29	NOTICE OF APPEAL as to 27 Order of Remand,, 16 Order on Motion to Stay, by

Pacific Life Insurance Company. (Rankin, W.) (Entered: 07/01/2004)

* * * * *

7/12/04	33	USCA Case Number 04-2687 for 29 Notice of Appeal filed by Pacific Life Insurance Company. (dlr) (Entered: 07/13/2004)
9/2/04	34	MOTION to Stay re 27 Order of Remand, by Pacific Life Insurance Company. (Rankin, W.) (Entered: 09/02/2004)
9/8/04	35	MEMORANDUM AND ORDER denying Pacific Life's September 2, 2004 motion to stay 34. Signed by Judge Michael J. Reagan on 9/8/04. (lmb) (Entered: 09/08/2004)
11/3/04	36	NOTICE by Pacific Life Insurance Company re 27 Order of Remand, *Notice of Stay of Order of Remand* (Rankin, W.) (Entered: 11/03/2004)

* * * * *

5/11/05	46	MANDATE of USCA as to 29 Notice of Appeal filed by Pacific Life Insurance Company; the judgment of the District Court is REVERSED, with costs, and the case is remanded with instructions to undo the remand orders and dismiss plaintiffs' state-law claims. (tjh) (Entered: 05/18/2005)

* * * * *

5/13/05	41	NOTICE by Terry Spurgeon *of Filing of Amended Complaint As of Right* (King, Robert) (Entered: 05/13/2005)
5/13/05	42	AMENDED COMPLAINT (STRICKEN - see Order 52) against Pacific Life Insur-

ance Company, filed by Terry Spurgeon. (King, Robert) Modified on 5/31/2005 (acm). (Entered: 05/13/2005)

5/13/05 43 First MOTION to Amend/Correct 2 Complaint *In the Alternative to Notice of Filing Amended Complaint as of Right* by Terry Spurgeon. (King, Robert) (Entered: 05/13/2005)

5/13/05 44 MEMORANDUM in Support re 43 First MOTION to Amend/Correct 2 Complaint *In the Alternative to Notice of Filing Amended Complaint as of Right* filed by Terry Spurgeon. (King, Robert) (Entered: 05/13/2005)

5/16/05 45 ORDER Regarding Action due by 6/2/2005: On 4/5/05, the Court of Appeals for the Seventh Circuit directed this Court to "undo the remand order" entered by the undersigned Judge in June 2004 and "dismiss plaintiffs' state-law claims." Kircher v. Putnam Funds Trust, 403 F.3d 478, 484 (7th Cir. 2005). The undersigned Judge cannot comply with this directive until he receives the official Seventh Circuit mandate. To date, that mandate has not been received. On 5/13/05, however, Plaintiffs' counsel moved to amend the complaint (Doc. 43). The Court now DIRECTS Defendant Pacific Life to file a response to Doc. 43 by June 2, 2005. Based on the 5/13/05 pleadings, the Court anticipates that Plaintiffs also will move to remand this case to state court. The Court SETS A HEARING on the motion to amend complaint (Doc. 43) and any remand motion at 9:15 am on Friday, July 15, 2005.

Signed by Judge Michael J. Reagan on 5/16/05. (soh) (Entered: 05/16/2005)

* * * * *

5/25/05 49 ORDER granting in part and denying in part 47 Motion for Extension of Time to File Response: On the heels of the Seventh Circuit's opinion directing this Court to "undo the remand" and "dismiss plaintiffs' state-law claims" in this case, Plaintiffs filed both an amended complaint and a motion for LEAVE to file an amended complaint (Docs. 42, 43). The Court directed Defendant to respond to the motion for leave to amend by June 2, 2005. Defendant now moves the Court to extend the deadline by which it must answer the amended complaint. The Court grants that request (Doc. 47) in part, allowing the extension, but not the full amount of time sought by Defendant. Defendant shall have 10 days after this Court rules on the motion for leave to amend complaint (Doc. 43) in which to move, answer, or otherwise plead in response to the already-filed amended complaint (Doc. 42). Signed by Judge Michael J. Reagan on 5/25/05. (soh) (Entered: 05/25/2005)

5/26/05 50 MOTION to Enforce *Court of Appeals' Mandate* by Pacific Life Insurance Company. (Rankin, W.) (Entered: 05/26/2005)

5/26/05 51 RESPONSE in Opposition re 43 First MOTION to Amend/Correct 2 Complaint *In the Alternative to Notice of Filing Amended Complaint as of Right* filed by Pacific Life Insurance Company. (Attachments: # 1 Exhibit 1# 2 Exhibit 2

		# 3 Exhibit 3# 4 Exhibit 4# 5 Exhibit 5 # 6 Exhibit 6) (Rankin, W.) (Entered: 05/26/2005)
5/27/05	52	ORDER: Pursuant to the Seventh Circuit's May 10, 2005 mandate, this Court hereby "undoes" its prior remand Order and dismisses with prejudice Plaintiffs' claims. This renders moot Plaintiffs' motion for leave to amend and Defendant's motion to enforce. All claims having been dismissed, the Clerk of Court now will close this case. See Order for details. Signed by Judge Michael J. Reagan on 5/27/05. (soh) (Entered: 05/27/2005)
5/31/05	53	CLERK'S JUDGMENT – plaintiffs' claims in the original complaint are dismised with prejudice, in accord with the April 5, 2005 mandate. (acm) (Entered: 05/31/2005)
6/27/05	54	NOTICE OF APPEAL by Terry Spurgeon re Order 52, Judgment 53. Filing fee $ 255. (King, Robert) Modified on 7/5/2005 (dlr). (Entered: 06/27/2005)
		* * * * *
7/15/05	57	USCA Case Number 05-3011 for 54 Notice of Appeal filed by Terry Spurgeon. (dlr) (Entered: 07/18/2005)
		* * * * *

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 04-1495

CARL KIRCHER AND ROBERT BROCKWAY,
INDIVIDUALLY AND ON BEHALF OF
ALL OTHERS SIMILARLY SITUATED,
Plaintiffs-Appellees,

v.

PUTNAM FUNDS TRUST, ET AL.,
Defendants-Appellants.

DOCKET PROCEEDINGS

DATE	DOCKET ENTRY
3/1/04	Private civil case docketed. [04-1495] [1712569-1] Transcript information sheet due 3/11/04. Fee or IFP forms due on 3/15/04 for Putnam Funds Trust, for Putnam Investment. Docketing Statement due 3/4/04. (squi) [04-1495]
3/3/04	ORDER: Appellant Putnam Funds Trust in 04-1495, Appellant Putnam Investment in 04-1495 shall file a brief memorandum stating why this appeal should not be dismissed for lack of jurisdiction. [1712640-1] DW [04-1495] [1713294-1] Briefing is SUSPENDED pending further court order. (See order for further details) Jurisdictional memorandum due 3/16/04 for Putnam Investment, for Putnam Funds Trust. (kell) [04-1495]

* * * * *

3/16/04 Filed Appellant Putnam Funds Trust, Appellant Putnam Investment jurisdictional memorandum. [04-1495] [1717993-1] (nath) [04-1495]

3/18/04 ORDER: Appellee Carl Kircher in 04-1495, Appellee Robert Brockway in 04-1495 shall file a response to appellants' MEMORANDUM addressing the jurisdictional issue raised in the court's order of March 3, 2004. [1717378-1] DW [04-1495] Response due 3/24/04 for Robert Brockway, for Carl Kircher. (julr) [04-1495]

3/24/04 Filed Appellee Carl Kircher in 04-1495, Appellee Robert Brockway in 04-1495 response to Appellant Putnam Funds Trust in 04-1495, Appellant Putnam Investment in 04-1495 jurisdictional memorandum. [1718527-1] [04-1495] (nath) [04-1495]

* * * * *

6/29/04 Filed opinion of the court by Judge Easerbrook [*sic*]. Technically this opinion creates a conflict among the circuits about appellate review of decisions under SLUSA, so we have circulated it before release to all active judges under Cir.R. 40(e). But our disposition reflects nothing more than application of settled circuit law to a different substantive statue [*sic*]. We could not follow the second and ninth circuits without overruling Amoco Petroleum Additives and later decisions in this circuit. Because Amoco Petroleum Additives has the support of at least three other circuits – not to mention Things Remembered and Quackenbush –

overruling would be inappropriate. On the Rule 40(e) poll, none of the active judges favored a hearing en banc. The appeal is within our appellate jurisdition [*sic*] and will proceed to briefing and decision on the merits. Circuit Judge Frank H. Easterbrook, Circuit Judge Terence T. Evans, Circuit Judge Ann C. Williams. [1751744-1] [04-1495] (hard) [04-1495]

7/1/04 ORDER: The court, on its own motion, orders appellants and appellees to file a statement advising this court whether this appeal can be consolidated with Appeal Nos. 04-1496, 04-1608, 04-1628, 04-1650, 04-1651, 04-1660, 04-1661, and 04-2162 for purposes of briefing and disposition. The statements are due no later than July 9, 2004. DW [04-1495] (fern) [04-1495]

7/9/04 Filed Appellee Carl Kircher in 04-1495 statement on consolidation. [1754914-1] [04-1495] [1754914-1] (fern) [04-1495]

7/9/04 Filed Appellant Putnam Funds Trust in 04-1495, Appellant Putnam Investment in 04-1495, Appellant Putnam Int'l Equity in 04-1496, Appellant Putnam Investment in 04-1496, Appellant Putnam Investment in 04-1608, Appellant Putnam Investment Fu in 04-1608, Appellant Artisan Funds Inc in 04-1628, Appellant Artisan Partners in 04-1628, Appellant Scudder Int'l Fund in 04-1650, Appellant Deutsche Investment in 04-1650, Appellant Janus Investment Fun in 04-1651, Appellant Janus Capital Mgmt in 04-1651, Appellant Columbia Wanger in 04-1660, Appellant Columbia Acorn Trust in 04-1661, Appellant Van Kampen

Series in 04-2162, Appellant Van Kampen Investmen in 04-2162 joint statement regarding consolidation of appeals for purposes of briefing and disposition. [1757237-1] [04-1495, [*et al.*]] [1757237-1] (jenn) [04-1495 [*et al.*]]

7/14/04 ORDER: The court orders these appeals CONSOLIDATED for purposes of briefing and disposition: [1719008-1] DW [04-1495, [*et al.*]] 1. The appellants shall file a single, consolidated brief and required short appendix by 8/30/04. 2. The appellees shall file a single, consolidated brief by 10/4/04. 3. The appellants shall file a single, consolidated reply brief, if any, by 10/25/04. (hudk) [04-1495 [*et al.*]]

* * * * *

8/30/04 Filed 15c appellant's brief by Putnam Funds Trust in 04-1495, Putnam Investment in 04-1495, Putnam Int'l Equity in 04-1496, Putnam Investment in 04-1496, Putnam Investment in 04-1608, Putnam Investment Fu in 04-1608, Artisan Funds Inc in 04-1628, Artisan Partners in 04-1628, Scudder Int'l Fund in 04-1650, Deutsche Investment in 04-1650, Janus Investment Fun in 04-1651, Janus Capital Mgmt in 04-1651, Columbia Wanger in 04-1660, Columbia Acorn Trust in 04-1661, Van Kampen Series in 04-2162, Van Kampen Investmen in 04-2162, Pacific Life Insur C in 04-2687. Electronically Transmitted. [04-1495, [*et al.*]] [0-0] (andb) [04-1495 [*et al.*]]

8/30/04 Filed 10c appendix by Appellant Putnam Funds Trust in 04-1495, Appellant Putnam Investment in 04-1495, Appellant

Putnam Int'l Equity in 04-1496, Appellant Putnam Investment in 04-1496, Appellant Putnam Investment in 04-1608, Appellant Putnam Investment Fu in 04-1608, Appellant Artisan Funds Inc in 04-1628, Appellant Artisan Partners in 04-1628, Appellant Scudder Int'l Fund in 04-1650, Appellant Deutsche Investment in 04-1650, Appellant Janus Investment Fun in 04-1651, Appellant Janus Capital Mgmt in 04-1651, Appellant Columbia Wanger in 04-1660, Appellant Columbia Acorn Trust in 04-1661, Appellant Van Kampen Series in 04-2162, Appellant Van Kampen Investmen in 04-2162, Appellant Pacific Life Insur C in 04-2687. [04-1495, [*et al.*]] [1771540-1] (andb) [04-1495 [*et al.*]]

* * * * *

9/21/04 ORDER: Plaintiffs have initiated discovery, which the state judge has declined to stay pending the outcome of the appeal. Van Kampen seeks a stay from us. We issue the requested stay on the authority of 15 U.S.C. §77z-1(b)(4), which operates as an exception to the Anti-Injunction Act. Accordingly, plaintiffs are prohibited from seeking or taking any discovery in this litigation. If the remand order should be affirmed, the stay will terminate automatically when this court issues its mandate. [1775291-1] LAB [04-2162] (amyd) [04-2162]

* * * * *

10/6/04 Filed 15c appellee's brief by Carl Kircher in 04-1495, Robert Brockway in 04-1495, Steve Dudley in 04-1496, Beth Dudley in

04-1496, Steve Dudley in 04-1608, Beth Dudley in 04-1608, T. K. Parthasarathy in 04-1628, Edmund Woodbury in 04-1628, Stuart A. Smith in 04-1628, Sharon Smith in 04-1628, Dorothy Luettinger in 04-1650, Robert Potter in 04-1650, Dorothy Luettinger in 04-1651, Robert Potter in 04-1651, Gary Vogeler in 04-1660, Gary Vogeler in 04-1661, Avery Jackson in 04-2162, Terry Spurgeon in 04-2687. Electronically Transmitted. [04-1495, [*et al.*]] [0-0] (andb) [04-1495 [*et al.*]]

10/25/04 Filed 15c appellant's reply brief by Putnam Funds Trust in 04-1495, Putnam Investment in 04-1495, Putnam Int'l Equity in 04-1496, Putnam Investment in 04-1496, Putnam Investment in 04-1608, Putnam Investment Fu in 04-1608, Artisan Funds Inc in 04-1628, Artisan Partners in 04-1628, Scudder Int'l Fund in 04-1650, Deutsche Investment in 04-1650, Janus Investment Fun in 04-1651, Janus Capital Mgmt in 04-1651, Columbia Wanger in 04-1660, Columbia Acorn Trust in 04-1661, Van Kampen Series in 04-2162, Van Kampen Investmen in 04-2162, Pacific Life Insur C in 04-2687. Electronically Transmitted. [04-1495, [*et al.*]] [0-0] (andb) [04-1495 [*et al.*]]

10/26/04 ORDER issued GRANTING motion for stay. The district court's order remanding the case to state court is STAYED pending resolution of the appeal. [1776032-1] ERW [04-2687] (tiff) [04-2687]

* * * * *

1/7/05 Case heard and taken under advisement by panel: Circuit Judge Frank H. Easterbrook, Circuit Judge Kenneth F. Ripple, Circuit Judge Diane P. Wood. [04-1495, [*et al.*]] [1814513-1] (kam) [04-1495 [*et al.*]]

* * * * *

4/5/05 Filed opinion of the court by Judge Easterbrook. The judgments of the district court are REVERSED and the cases are REMANDED with instructions to undo the remand orders and dismiss plaintiffs' state-law claims. Circuit Judge Frank H. Easterbrook, Circuit Judge Kenneth F. Ripple, Circuit Judge Diane P. Wood. [04-1495, [*et al.*]] [1718486-1] (hard) [04-1495 [*et al.*]]

4/5/05 ORDER: Final judgment filed per opinion. With costs: y. [04-1495, [*et al.*]] [1844987-1] (hard) [04-1495 [*et al.*]]

4/19/05 Filed 30c Petition for Rehearing and Petition for Rehearing Enbanc by Appellee Carl Kircher in 04-1495, Appellee Robert Brockway in 04-1495, Appellee Steve Dudley in 04-1496, Appellee Beth Dudley in 04-1496, Appellee Steve Dudley in 04-1608, Appellee Beth Dudley in 04-1608, Appellee T. K. Parthasarathy in 04-1628, Appellee Edmund Woodbury in 04-1628, Appellee Stuart A. Smith in 04-1628, Appellee Sharon Smith in 04-1628, Appellee Dorothy Luettinger in 04-1650, Appellee Robert Potter in 04-1650, Appellee Dorothy Luettinger in 04-1651, Appellee Robert Potter in 04-1651, Appellee Gary Vogeler in 04-1660, Appellee Gary Vogeler in

04-1661, Appellee Avery Jackson in 04-2162, Appellee Terry Spurgeon in 04-2687. Dist. [04-1495, [*et al.*]] [1850156-1] (amyd) [04-1495 [*et al.*]]

5/2/05 ORDER: Appellee Carl Kircher in 04-1495, Appellee Robert Brockway in 04-1495, Appellee Steve Dudley in 04-1496, Appellee Beth Dudley in 04-1496, Appellee Steve Dudley in 04-1608, Appellee Beth Dudley in 04-1608, Appellee T. K. Parthasarathy in 04-1628, Appellee Edmund Woodbury in 04-1628, Appellee Stuart A. Smith in 04-1628, Appellee Sharon Smith in 04-1628, Appellee Dorothy Luettinger in 04-1650, Appellee Robert Potter in 04-1650, Appellee Dorothy Luettinger in 04-1651, Appellee Robert Potter in 04-1651, Appellee Gary Vogeler in 04-1660, Appellee Gary Vogeler in 04-1661, Appellee Avery Jackson in 04-2162, Appellee Terry Spurgeon in 04-2687 Petition for Rehearing and Petition for Rehearing Enbanc is DENIED. [04-1495, [*et al.*]] [1850156-1] (fern) [04-1495 [*et al.*]]

5/10/05 MANDATE ISSUED AND ENTIRE RECORD RETURNED. (Contents returned: 12 vol. pleadings; 1 vol. loose pleadings; 2 vol. exhibits.) [04-1495, [*et al.*]] [1754123-1] (cove) [04-1495 [*et al.*]]

* * * * *

7/26/05 Notice from the Supreme Court that a motion for extension of time to file a Petition for Writ of Certiorari has been GRANTED, extending such time to

8/30/05. [1718486-1] [04-1495, [*et al.*]] (elea) [04-1495 [*et al.*]]

9/2/05 Notice from the Supreme Court that a motion for extension of time to file a Petition for Writ of Certiorari has been GRANTED, extending such time to 9/29/05. [1718486-1] [04-1495, [*et al.*]] (elea) [04-1495 [*et al.*]]

10/4/05 Filed notice from the Supreme Court of the filing of a Petition for Writ of Certiorari. Supreme Court Case No.: 05-409. [04-1495, [*et al.*]] [1908945-1] (elea) [04-1495 [*et al.*]]

1/23/06 Filed order from the Supreme Court, the Petition for Writ of Certiorari is GRANTED limited to question 1 presented by the petition. Supreme Court Case No.: 05-409. [04-1495, [*et al.*]] [1946536-1] (hudk) [04-1495 [*et al.*]]

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 04-1496

STEVE DUDLEY AND BETH DUDLEY,
INDIVIDUALLY AND ON BEHALF OF ALL OTHERS
SIMILARLY SITUATED,
Plaintiffs-Appellees,

v.

PUTNAM INTERNATIONAL EQUITY FUND, ET AL.,
Defendants-Appellants.

DOCKET PROCEEDINGS

DATE	DOCKET ENTRY
3/1/04	Private civil case docketed. [04-1496] [1712569-1] Transcript information sheet due 3/11/04. Fee or IFP forms due on 3/15/04 for Putnam Int'l Equity, for Putnam Investment. Docketing Statement due 3/4/04. (squi) [04-1496]
3/3/04	ORDER: Appellant Putnam Int'l Equity in 04-1496, Appellant Putnam Investment in 04-1496 shall file a brief memorandum stating why this appeal should not be dismissed for lack of jurisdiction. [1712569-1] DW [04-1496] [1713323-1] Briefing is SUSPENDED pending further court order. (See order for further details) Jurisdictional memorandum due 3/16/04 for Putnam Investment, for Putnam Int'l Equity. (amyd) [04-1496]

* * * * *

3/16/04 Filed Appellant Putnam Int'l Equity in 04-1496, Appellant Putnam Investment in 04-1496 jurisdictional memorandum. [04-1496] [1717995-1] (nath) [04-1496]

3/17/04 ORDER: The court, on its own motion, orders these appeals CONSOLIDATED for purposes of briefing and disposition. [1716867-1] DW [04-1496, 04-1608] [1718461-1] Briefing is SUSPENDED pending further court order. (amyd) [04-1496 04-1608]

* * * * *

3/18/04 ORDER: Appellee Steve Dudley in 04-1496, Appellee Beth Dudley in 04-1496, Appellee Steve Dudley in 04-1608, Appellee Beth Dudley in 04-1608 shall file a response to appellants' MEMORANDUM addressing the jurisdictional issue raised in the court's order of March 3, 2004. [1717504-1] [04-1496, 04-1608] Response due 3/24/04 for Beth Dudley in 04-1496, for Steve Dudley in 04-1496, for Beth Dudley in 04-1608, for Steve Dudley in 04-1608. (julr) [04-1496 04-1608]

* * * * *

3/24/04 Filed Appellee Steve Dudley in 04-1496, Appellee Beth Dudley in 04-1496, Appellee Steve Dudley in 04-1608, Appellee Beth Dudley in 04-1608 jurisdictional memorandum, per this court's 3/18/04 order. [04-1496, 04-1608] [1720923-1] (julr) [04-1496 04-1608]

* * * * *

6/30/04 ORDER: This consolidated appeal is within our appellate jurisdition [*sic*] and

will proceed to briefing and decision on the merits. See Kircher V. Putnam Funds Trust, No. 04-1495, slip op. (7th Cir June 29, 2004). [1716867-1] DW [04-1496, 04-1608] (julr) [04-1496 04-1608]

7/1/04 ORDER: The court, on its own motion, orders appellants and appellees to file a statement advising this court whether this consolidated appeal can be consolidated with appeal nos. 04-1495, 04-1628, 04-1650, 04-1651, 04-1660, 04-1661, and 04-2162 for purposes of briefing and disposition. The statements are due no later than 7/9/04. DW [04-1496, 04-1608] (kell) [04-1496, 04-1608]

7/9/04 Filed Appellee Steve Dudley in 04-1496, Appellee Beth Dudley in 04-1496, Appellee Steve Dudley in 04-1608, Appellee Beth Dudley in 04-1608 statement on consolidation. [1754955-1] [04-1496, 04-1608] [1754955-1] (fern) [04-1496, 04-1608]

7/9/04 Filed Appellant Putnam Funds Trust in 04-1495, Appellant Putnam Investment in 04-1495, Appellant Putnam Int'l Equity in 04-1496, Appellant Putnam Investment in 04-1496, Appellant Putnam Investment in 04-1608, Appellant Putnam Investment Fu in 04-1608, Appellant Artisan Funds Inc in 04-1628, Appellant Artisan Partners in 04-1628, Appellant Scudder Int'l Fund in 04-1650, Appellant Deutsche Investment in 04-1650, Appellant Janus Investment Fun in 04-1651, Appellant Janus Capital Mgmt in 04-1651, Appellant Columbia Wanger in 04-1660, Appellant Columbia Acorn

Trust in 04-1661, Appellant Van Kampen Series in 04-2162, Appellant Van Kampen Investmen in 04-2162 joint statement regarding consolidation of appeals for purposes of briefing and disposition. [1757237-1] [04-1495, [*et al.*]] [1757237-1] (jenn) [04-1495 [*et al.*]]

7/14/04 ORDER: The court orders these appeals CONSOLIDATED for purposes of briefing and disposition: [1719008-1] DW [04-1495, [*et al.*]] 1. The appellants shall file a single, consolidated brief and required short appendix by 8/30/04. 2. The appellees shall file a single, consolidated brief by 10/4/04. 3. The appellants shall file a single, consolidated reply brief, if any, by 10/25/04. (hudk) [04-1495 [*et al.*]]

* * * * *

8/30/04 Filed 15c appellant's brief by Putnam Funds Trust in 04-1495, Putnam Investment in 04-1495, Putnam Int'l Equity in 04-1496, Putnam Investment in 04-1496, Putnam Investment in 04-1608, Putnam Investment Fu in 04-1608, Artisan Funds Inc in 04-1628, Artisan Partners in 04-1628, Scudder Int'l Fund in 04-1650, Deutsche Investment in 04-1650, Janus Investment Fun in 04-1651, Janus Capital Mgmt in 04-1651, Columbia Wanger in 04-1660, Columbia Acorn Trust in 04-1661, Van Kampen Series in 04-2162, Van Kampen Investmen in 04-2162, Pacific Life Insur C in 04-2687. Electronically Transmitted. [04-1495, [*et al.*]] [0-0] (andb) [04-1495 [*et al.*]]

8/30/04 Filed 10c appendix by Appellant Putnam Funds Trust in 04-1495, Appellant Put-

nam Investment in 04-1495, Appellant Putnam Int'l Equity in 04-1496, Appellant Putnam Investment in 04-1496, Appellant Putnam Investment in 04-1608, Appellant Putnam Investment Fu in 04-1608, Appellant Artisan Funds Inc in 04-1628, Appellant Artisan Partners in 04-1628, Appellant Scudder Int'l Fund in 04-1650, Appellant Deutsche Investment in 04-1650, Appellant Janus Investment Fun in 04-1651, Appellant Janus Capital Mgmt in 04-1651, Appellant Columbia Wanger in 04-1660, Appellant Columbia Acorn Trust in 04-1661, Appellant Van Kampen Series in 04-2162, Appellant Van Kampen Investmen in 04-2162, Appellant Pacific Life Insur C in 04-2687. [04-1495, [*et al.*]] [1771540-1] (andb) [04-1495 [*et al.*]]

* * * * *

10/6/04 Filed 15c appellee's brief by Carl Kircher in 04-1495, Robert Brockway in 04-1495, Steve Dudley in 04-1496, Beth Dudley in 04-1496, Steve Dudley in 04-1608, Beth Dudley in 04-1608, T. K. Parthasarathy in 04-1628, Edmund Woodbury in 04-1628, Stuart A. Smith in 04-1628, Sharon Smith in 04-1628, Dorothy Luettinger in 04-1650, Robert Potter in 04-1650, Dorothy Luettinger in 04-1651, Robert Potter in 04-1651, Gary Vogeler in 04-1660, Gary Vogeler in 04-1661, Avery Jackson in 04-2162, Terry Spurgeon in 04-2687. Electronically Transmitted. [04-1495, [*et al.*]] [0-0] (andb) [04-1495 [*et al.*]]

10/25/04 Filed 15c appellant's reply brief by Putnam Funds Trust in 04-1495, Putnam In-

vestment in 04-1495, Putnam Int'l Equity in 04-1496, Putnam Investment in 04-1496, Putnam Investment in 04-1608, Putnam Investment Fu in 04-1608, Artisan Funds Inc in 04-1628, Artisan Partners in 04-1628, Scudder Int'l Fund in 04-1650, Deutsche Investment in 04-1650, Janus Investment Fun in 04-1651, Janus Capital Mgmt in 04-1651, Columbia Wanger in 04-1660, Columbia Acorn Trust in 04-1661, Van Kampen Series in 04-2162, Van Kampen Investmen in 04-2162, Pacific Life Insur C in 04-2687. Electronically Transmitted. [04-1495, [*et al.*]] [0-0] (andb) [04-1495 [*et al.*]]

10/26/04 ORDER issued GRANTING motion for stay. The district court's order remanding the case to state court is STAYED pending resolution of the appeal. [1776032-1] ERW [04-2687] (tiff) [04-2687]

* * * * *

1/7/05 Case heard and taken under advisement by panel: Circuit Judge Frank H. Easterbrook, Circuit Judge Kenneth F. Ripple, Circuit Judge Diane P. Wood. [04-1495, [*et al.*]] [1814513-1] (kare) [04-1495 [*et al.*]]

* * * * *

4/5/05 Filed opinion of the court by Judge Easterbrook. The judgments of the district court are REVERSED and the cases are REMANDED with instructions to undo the remand orders and dismiss plaintiffs' state-law claims. Circuit Judge Frank H. Easterbrook, Circuit Judge Kenneth F. Ripple, Circuit Judge Diane

P. Wood. [04-1495, [*et al.*]] [1718486-1] (hard) [04-1495 [*et al.*]]

4/5/05 ORDER: Final judgment filed per opinion. With costs: y. [04-1495, [*et al.*]] [1844987-1] (hard) [04-1495 [*et al.*]]

4/19/05 Filed 30c Petition for Rehearing and Petition for Rehearing Enbanc by Appellee Carl Kircher in 04-1495, Appellee Robert Brockway in 04-1495, Appellee Steve Dudley in 04-1496, Appellee Beth Dudley in 04-1496, Appellee Steve Dudley in 04-1608, Appellee Beth Dudley in 04-1608, Appellee T. K. Parthasarathy in 04-1628, Appellee Edmund Woodbury in 04-1628, Appellee Stuart A. Smith in 04-1628, Appellee Sharon Smith in 04-1628, Appellee Dorothy Luettinger in 04-1650, Appellee Robert Potter in 04-1650, Appellee Dorothy Luettinger in 04-1651, Appellee Robert Potter in 04-1651, Appellee Gary Vogeler in 04-1660, Appellee Gary Vogeler in 04-1661, Appellee Avery Jackson in 04-2162, Appellee Terry Spurgeon in 04-2687. Dist. [04-1495, [*et al.*]] [1850156-1] (amyd) [04-1495 [*et al.*]]

5/2/05 ORDER: Appellee Carl Kircher in 04-1495, Appellee Robert Brockway in 04-1495, Appellee Steve Dudley in 04-1496, Appellee Beth Dudley in 04-1496, Appellee Steve Dudley in 04-1608, Appellee Beth Dudley in 04-1608, Appellee T. K. Parthasarathy in 04-1628, Appellee Edmund Woodbury in 04-1628, Appellee Stuart A. Smith in 04-1628, Appellee Sharon Smith in 04-1628, Appellee Dorothy Luettinger in 04-1650, Appellee Robert Potter in

04-1650, Appellee Dorothy Luettinger in 04-1651, Appellee Robert Potter in 04-1651, Appellee Gary Vogeler in 04-1660, Appellee Gary Vogeler in 04-1661, Appellee Avery Jackson in 04-2162, Appellee Terry Spurgeon in 04-2687 Petition for Rehearing and Petition for Rehearing Enbanc is DENIED. [04-1495, [*et al.*]] [1850156-1] (fern) [04-1495 [*et al.*]]

5/10/05 MANDATE ISSUED AND ENTIRE RECORD RETURNED. (Contents returned: 12 vol. pleadings; 1 vol. loose pleadings; 2 vol. exhibits.) [04-1495, [*et al.*]] [1754123-1] (cove) [04-1495 [*et al.*]]

* * * * *

7/26/05 Notice from the Supreme Court that a motion for extension of time to file a Petition for Writ of Certiorari has been GRANTED, extending such time to 8/30/05. [1718486-1] [04-1495, [*et al.*]] (elea) [04-1495 [*et al.*]]

9/2/05 Notice from the Supreme Court that a motion for extension of time to file a Petition for Writ of Certiorari has been GRANTED, extending such time to 9/29/05. [1718486-1] [04-1495, [*et al.*]] (elea) [04-1495 [*et al.*]]

10/4/05 Filed notice from the Supreme Court of the filing of a Petition for Writ of Certiorari. Supreme Court Case No.: 05-409. [04-1495, [*et al.*]] [1908945-1] (elea) [04-1495 [*et al.*]]

1/23/06 Filed order from the Supreme Court, the Petition for Writ of Certiorari is GRANTED limited to question 1 pre-

sented by the petition. Supreme Court Case No.: 05-409. [04-1495, [*et al.*]] [1946536-1] (hudk) [04-1495 [*et al.*]]

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 04-1608

STEVE DUDLEY AND BETH DUDLEY,
INDIVIDUALLY AND ON BEHALF OF ALL OTHERS
SIMILARLY SITUATED,
Plaintiffs-Appellees,

v.

PUTNAM INVESTMENT MANAGEMENT, LLC, ET AL.,
Defendants-Appellants.

DOCKET PROCEEDINGS

DATE	DOCKET ENTRY
3/12/04	Private civil case docketed. [04-1608] [1716867-1] Transcript information sheet due 3/22/04. Fee or IFP forms due on 3/26/04 for Putnam Investment, for Putnam Investment Fu. Docketing Statement due 3/4/04. (hudk) [04-1608]
	* * * * *
3/16/04	Filed Appellant Putnam Investment in 04-1608, Appellant Putnam Investment Fu in 04-1608 jurisdictional memorandum. [04-1608] [1717997-1] (nath) [04-1608]
3/17/04	ORDER: Appellant Putnam Investment in 04-1608. Appellant Putnam Investment Fu in 04-1608 shall file a brief memorandum stating why this appeal should not be dismissed for lack of jurisdiction. [1712640-1] DW [04-1608]

[1718138-1] Briefing is SUSPENDED pending further court order. (See order for further details) Jurisdictional memorandum due 3/29/04 for Putnam Investment Fu, for Putnam Investment. (hudk) [04-1608]

3/17/04 ORDER: The court, on its own motion, orders these appeals CONSOLIDATED for purposes of briefing and disposition. [1716867-1] DW [04-1496, 04-1608] [1718461-1] Briefing is SUSPENDED pending further court order. (amyd) [04-1496 04-1608]

* * * * *

3/18/04 ORDER: Appellee Steve Dudley in 04-1496, Appellee Beth Dudley in 04-1496, Appellee Steve Dudley in 04-1608, Appellee Beth Dudley in 04-1608 shall file a response to appellants' MEMORANDUM addressing the jurisdictional issue raised in the court's order of March 3, 2004. [1717504-1] [04-1496, 04-1608] Response due 3/24/04 for Beth Dudley in 04-1496, for Steve Dudley in 04-1496, for Beth Dudley in 04-1608, for Steve Dudley in 04-1608. (julr) [04-1496 04-1608]

* * * * *

3/24/04 Filed Appellee Steve Dudley in 04-1496, Appellee Beth Dudley in 04-1496, Appellee Steve Dudley in 04-1608, Appellee Beth Dudley in 04-1608 jurisdictional memorandum, per this court's 3/18/04 order. [04-1496, 04-1608] [1720923-1] (julr) [04-1496 04-1608]

* * * * *

6/30/04 ORDER: This consolidated appeal is within our appellate jurisdition [*sic*] and will proceed to briefing and decision on the merits. See Kircher V. Putnam Funds Trust, No. 04-1495, slip op. (7th Cir June 29, 2004). [1716867-1] DW [04-1496, 04-1608] (julr) [04-1496 04-1608]

7/1/04 ORDER: The court, on its own motion, orders appellants and appellees to file a statement advising this court whether this consolidated appeal can be consolidated with appeal nos. 04-1495, 04-1628, 04-1650, 04-1651, 04-1660, 04-1661, and 04-2162 for purposes of briefing and disposition. The statements are due no later than 7/9/04. DW [04-1496, 04-1608] (kell) [04-1496, 04-1608]

7/9/04 Filed Appellee Steve Dudley in 04-1496, Appellee Beth Dudley in 04-1496, Appellee Steve Dudley in 04-1608, Appellee Beth Dudley in 04-1608 statement on consolidation. [1754955-1] [04-1496, 04-1608] [1754955-1] (fern) [04-1496, 04-1608]

7/9/04 Filed Appellant Putnam Funds Trust in 04-1495, Appellant Putnam Investment in 04-1495, Appellant Putnam Int'l Equity in 04-1496, Appellant Putnam Investment in 04-1496, Appellant Putnam Investment in 04-1608, Appellant Putnam Investment Fu in 04-1608, Appellant Artisan Funds Inc in 04-1628, Appellant Artisan Partners in 04-1628, Appellant Scudder Int'l Fund in 04-1650, Appellant Deutsche Investment in 04-1650, Appellant Janus Investment Fun in 04-1651, Appellant Janus Capital Mgmt

in 04-1651, Appellant Columbia Wanger in 04-1660, Appellant Columbia Acorn Trust in 04-1661, Appellant Van Kampen Series in 04-2162, Appellant Van Kampen Investmen in 04-2162 joint statement regarding consolidation of appeals for purposes of briefing and disposition. [1757237-1] [04-1495, [*et al.*]] [1757237-1] (jenn) [04-1495 [*et al.*]]

7/14/04 ORDER: The court orders these appeals CONSOLIDATED for purposes of briefing and disposition: [1719008-1] DW [04-1495, [*et al.*]] 1. The appellants shall file a single, consolidated brief and required short appendix by 8/30/04. 2. The appellees shall file a single, consolidated brief by 10/4/04. 3. The appellants shall file a single, consolidated reply brief, if any, by 10/25/04. (hudk) [04-1495 [*et al.*]]

* * * * *

8/30/04 Filed 15c appellant's brief by Putnam Funds Trust in 04-1495, Putnam Investment in 04-1495, Putnam Int'l Equity in 04-1496, Putnam Investment in 04-1496, Putnam Investment in 04-1608, Putnam Investment Fu in 04-1608, Artisan Funds Inc in 04-1628, Artisan Partners in 04-1628, Scudder Int'l Fund in 04-1650, Deutsche Investment in 04-1650, Janus Investment Fun in 04-1651, Janus Capital Mgmt in 04-1651, Columbia Wanger in 04-1660, Columbia Acorn Trust in 04-1661, Van Kampen Series in 04-2162, Van Kampen Investmen in 04-2162, Pacific Life Insur C in 04-2687. Electronically Transmitted. [04-1495, [*et al.*]] [0-0] (andb) [04-1495 [*et al.*]]

8/30/04 Filed 10c appendix by Appellant Putnam Funds Trust in 04-1495, Appellant Putnam Investment in 04-1495, Appellant Putnam Int'l Equity in 04-1496, Appellant Putnam Investment in 04-1496, Appellant Putnam Investment in 04-1608, Appellant Putnam Investment Fu in 04-1608, Appellant Artisan Funds Inc in 04-1628, Appellant Artisan Partners in 04-1628, Appellant Scudder Int'l Fund in 04-1650, Appellant Deutsche Investment in 04-1650, Appellant Janus Investment Fun in 04-1651, Appellant Janus Capital Mgmt in 04-1651, Appellant Columbia Wanger in 04-1660, Appellant Columbia Acorn Trust in 04-1661, Appellant Van Kampen Series in 04-2162, Appellant Van Kampen Investmen in 04-2162, Appellant Pacific Life Insur C in 04-2687. [04-1495, [*et al.*]] [1771540-1] (andb) [04-1495 [*et al.*]]

* * * * *

10/6/04 Filed 15c appellee's brief by Carl Kircher in 04-1495, Robert Brockway in 04-1495, Steve Dudley in 04-1496, Beth Dudley in 04-1496, Steve Dudley in 04-1608, Beth Dudley in 04-1608, T. K. Parthasarathy in 04-1628, Edmund Woodbury in 04-1628, Stuart A. Smith in 04-1628, Sharon Smith in 04-1628, Dorothy Luettinger in 04-1650, Robert Potter in 04-1650, Dorothy Luettinger in 04-1651, Robert Potter in 04-1651, Gary Vogeler in 04-1660, Gary Vogeler in 04-1661, Avery Jackson in 04-2162, Terry Spurgeon in 04-2687. Electronically Transmitted. [04-1495, [*et al.*]] [0-0] (andb) [04-1495 [*et al.*]]

10/25/04 Filed 15c appellant's reply brief by Putnam Funds Trust in 04-1495, Putnam Investment in 04-1495, Putnam Int'l Equity in 04-1496, Putnam Investment in 04-1496, Putnam Investment in 04-1608, Putnam Investment Fu in 04-1608, Artisan Funds Inc in 04-1628, Artisan Partners in 04-1628, Scudder Int'l Fund in 04-1650, Deutsche Investment in 04-1650, Janus Investment Fun in 04-1651, Janus Capital Mgmt in 04-1651, Columbia Wanger in 04-1660, Columbia Acorn Trust in 04-1661, Van Kampen Series in 04-2162, Van Kampen Investmen in 04-2162, Pacific Life Insur C in 04-2687. Electronically Transmitted. [04-1495, [*et al.*]] [0-0] (andb) [04-1495 [*et al.*]]

10/26/04 ORDER issued GRANTING motion for stay. The district court's order remanding the case to state court is STAYED pending resolution of the appeal. [1776032-1] ERW [04-2687] (tiff) [04-2687]

* * * * *

1/7/05 Case heard and taken under advisement by panel: Circuit Judge Frank H. Easterbrook, Circuit Judge Kenneth F. Ripple, Circuit Judge Diane P. Wood. [04-1495, [*et al.*]] [1814513-1] (kare) [04-1495 [*et al.*]]

* * * * *

4/5/05 Filed opinion of the court by Judge Easterbrook. The judgments of the district court are REVERSED and the cases are REMANDED with instructions to undo the remand orders and dismiss plaintiffs' state-law claims. Circuit Judge

Frank H. Easterbrook, Circuit Judge Kenneth F. Ripple, Circuit Judge Diane P. Wood. [04-1495, [*et al.*]] [1718486-1] (hard) [04-1495 [*et al.*]]

4/5/05 ORDER: Final judgment filed per opinion. With costs: y. [04-1495, [*et al.*]] [1844987-1] (hard) [04-1495 [*et al.*]]

4/19/05 Filed 30c Petition for Rehearing and Petition for Rehearing Enbanc by Appellee Carl Kircher in 04-1495, Appellee Robert Brockway in 04-1495, Appellee Steve Dudley in 04-1496, Appellee Beth Dudley in 04-1496, Appellee Steve Dudley in 04-1608, Appellee Beth Dudley in 04-1608, Appellee T. K. Parthasarathy in 04-1628, Appellee Edmund Woodbury in 04-1628, Appellee Stuart A. Smith in 04-1628, Appellee Sharon Smith in 04-1628, Appellee Dorothy Luettinger in 04-1650, Appellee Robert Potter in 04-1650, Appellee Dorothy Luettinger in 04-1651, Appellee Robert Potter in 04-1651, Appellee Gary Vogeler in 04-1660, Appellee Gary Vogeler in 04-1661, Appellee Avery Jackson in 04-2162, Appellee Terry Spurgeon in 04-2687. Dist. [04-1495, [*et al.*]] [1850156-1] (amyd) [04-1495 [*et al.*]]

5/2/05 ORDER: Appellee Carl Kircher in 04-1495, Appellee Robert Brockway in 04-1495, Appellee Steve Dudley in 04-1496, Appellee Beth Dudley in 04-1496, Appellee Steve Dudley in 04-1608, Appellee Beth Dudley in 04-1608, Appellee T. K. Parthasarathy in 04-1628, Appellee Edmund Woodbury in 04-1628, Appellee Stuart A. Smith in 04-1628, Appellee Sharon Smith in

04-1628, Appellee Dorothy Luettinger in 04-1650, Appellee Robert Potter in 04-1650, Appellee Dorothy Luettinger in 04-1651, Appellee Robert Potter in 04-1651, Appellee Gary Vogeler in 04-1660, Appellee Gary Vogeler in 04-1661, Appellee Avery Jackson in 04-2162, Appellee Terry Spurgeon in 04-2687 Petition for Rehearing and Petition for Rehearing Enbanc is DENIED. [04-1495, [*et al.*]] [1850156-1] (fern) [04-1495 [*et al.*]]

5/10/05 MANDATE ISSUED AND ENTIRE RECORD RETURNED. (Contents returned: 12 vol. pleadings; 1 vol. loose pleadings; 2 vol. exhibits.) [04-1495, [*et al.*]] [1754123-1] (cove) [04-1495 [*et al.*]]

* * * * *

7/26/05 Notice from the Supreme Court that a motion for extension of time to file a Petition for Writ of Certiorari has been GRANTED, extending such time to 8/30/05. [1718486-1] [04-1495, [*et al.*]] (elea) [04-1495 [*et al.*]]

9/2/05 Notice from the Supreme Court that a motion for extension of time to file a Petition for Writ of Certiorari has been GRANTED, extending such time to 9/29/05. [1718486-1] [04-1495, [*et al.*]] (elea) [04-1495 [*et al.*]]

10/4/05 Filed notice from the Supreme Court of the filing of a Petition for Writ of Certiorari. Supreme Court Case No.: 05-409. [04-1495, [*et al.*]] [1908945-1] (elea) [04-1495 [*et al.*]]

1/23/06	Filed order from the Supreme Court, the Petition for Writ of Certiorari is GRANTED limited to question 1 presented by the petition. Supreme Court Case No.: 05-409. [04-1495, [*et al.*]] [1946536-1] (hudk) [04-1495 [*et al.*]]

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 04-1628

T.K. PARTHASARATHY, ET AL., INDIVIDUALLY
AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Plaintiffs-Appellees,

v.

ARTISAN FUNDS, INC., A CORPORATION, ET AL.,
Defendants-Appellants.

DOCKET PROCEEDINGS

DATE	DOCKET ENTRY
3/15/04	Private civil case docketed. [04-1628] [1717625-1] Transcript information sheet due 3/25/04. Fee or IFP forms due on 3/29/04 for Artisan Funds Inc, for Artisan Partners. Docketing Statement due 3/8/04. (hudk) [04-1628]
	* * * * *
3/18/04	ORDER: Appellant Artisan Funds Inc. Appellant Artisan Partners shall file a brief memorandum stating why this appeal should not be dismissed for lack of jurisdiction. [1717625-1] DW [04-1628] [1718569-1] Briefing is SUSPENDED pending further court order. (See order for further details) Jurisdictional memorandum due 4/1/04 for Artisan Partners, for Artisan Funds Inc. (hudk) [04-1628]
	* * * * *

4/1/04 Filed Appellant Artisan Funds Inc, Appellant Artisan Partners jurisdictional memorandum. [04-1628] [1724201-1] (amyd) [04-1628]

* * * * *

6/30/04 ORDER: This appeal is within our appellate jurisdiction and will proceed to briefing and decision on the merits. See Kircher v. Putnam Funds Trust, No. 04-1495, slip op. (7th Cir June 29, 2004). [1717625-1] DW [04-1628] (amyd) [04-1628]

* * * * *

7/14/04 ORDER: The court orders these appeals CONSOLIDATED for purposes of briefing and disposition: [1719008-1] DW [04-1495, [*et al.*]] 1. The appellants shall file a single, consolidated brief and required short appendix by 8/30/04. 2. The appellees shall file a single, consolidated brief by 10/4/04. 3. The appellants shall file a single, consolidated reply brief, if any, by 10/25/04. (hudk) [04-1495 [*et al.*]]

* * * * *

8/30/04 Filed 15c appellant's brief by Putnam Funds Trust in 04-1495, Putnam Investment in 04-1495, Putnam Int'l Equity in 04-1496, Putnam Investment in 04-1496, Putnam Investment in 04-1608, Putnam Investment Fu in 04-1608, Artisan Funds Inc in 04-1628, Artisan Partners in 04-1628, Scudder Int'l Fund in 04-1650, Deutsche Investment in 04-1650, Janus Investment Fun in 04-1651, Janus Capital Mgmt in 04-1651, Columbia Wanger in 04-1660, Columbia Acorn Trust in

04-1661, Van Kampen Series in 04-2162, Van Kampen Investmen in 04-2162, Pacific Life Insur C in 04-2687. Electronically Transmitted. [04-1495, [*et al.*]] [0-0] (andb) [04-1495 [*et al.*]]

8/30/04 Filed 10c appendix by Appellant Putnam Funds Trust in 04-1495, Appellant Putnam Investment in 04-1495, Appellant Putnam Int'l Equity in 04-1496, Appellant Putnam Investment in 04-1496, Appellant Putnam Investment in 04-1608, Appellant Putnam Investment Fu in 04-1608, Appellant Artisan Funds Inc in 04-1628, Appellant Artisan Partners in 04-1628, Appellant Scudder Int'l Fund in 04-1650, Appellant Deutsche Investment in 04-1650, Appellant Janus Investment Fun in 04-1651, Appellant Janus Capital Mgmt in 04-1651, Appellant Columbia Wanger in 04-1660, Appellant Columbia Acorn Trust in 04-1661, Appellant Van Kampen Series in 04-2162, Appellant Van Kampen Investmen in 04-2162, Appellant Pacific Life Insur C in 04-2687. [04-1495, [*et al.*]] [1771540-1] (andb) [04-1495 [*et al.*]]

* * * * *

10/6/04 Filed 15c appellee's brief by Carl Kircher in 04-1495, Robert Brockway in 04-1495, Steve Dudley in 04-1496, Beth Dudley in 04-1496, Steve Dudley in 04-1608, Beth Dudley in 04-1608, T. K. Parthasarathy in 04-1628, Edmund Woodbury in 04-1628, Stuart A. Smith in 04-1628, Sharon Smith in 04-1628, Dorothy Luettinger in 04-1650, Robert Potter in 04-1650, Dorothy Luettinger in 04-1651, Robert Potter in 04-1651, Gary Vogeler in

04-1660, Gary Vogeler in 04-1661, Avery Jackson in 04-2162, Terry Spurgeon in 04-2687. Electronically Transmitted. [04-1495, [*et al.*]] [0-0] (andb) [04-1495 [*et al.*]]

10/25/04 Filed 15c appellant's reply brief by Put- Funds Trust in 04-1495, Putnam In- tment in 04-1495, Putnam Int'l Equity in 04-1496, Putnam Investment in 04-1496, Putnam Investment in 04-1608, Putnam Investment Fu in 04-1608, Artisan Funds Inc in 04-1628, Artisan Partners in 04-1628, Scudder Int'l Fund in 04-1650, Deutsche Investment in 04-1650, Janus Investment Fun in 04-1651, Janus Capital Mgmt in 04-1651, Columbia Wanger in 04-1660, Columbia Acorn Trust in 04-1661, Van Kampen Series in 04-2162, Van Kampen Investmen in 04-2162, Pacific Life Insur C in 04-2687. Electronically Transmitted. [04-1495, [*et al.*]] [0-0] (andb) [04-1495 [*et al.*]]

10/26/04 ORDER issued GRANTING motion for stay. The district court's order remanding the case to state court is STAYED pending resolution of the appeal. [1776032-1] ERW [04-2687] (tiff) [04-2687]

* * * * *

1/7/05 Case heard and taken under advisement by panel: Circuit Judge Frank H. Easterbrook, Circuit Judge Kenneth F. Ripple, Circuit Judge Diane P. Wood. [04-1495, [*et al.*]] [1814513-1] (kare) [04-1495 [*et al.*]]

* * * * *

4/5/05	Filed opinion of the court by Judge Easterbrook. The judgments of the district court are REVERSED and the cases are REMANDED with instructions to undo the remand orders and dismiss plaintiffs' state-law claims. Circuit Judge Frank H. Easterbrook, Circuit Judge Kenneth F. Ripple, Circuit Judge Diane P. Wood. [04-1495, [*et al.*]] [1718486-1] (hard) [04-1495 [*et al.*]]
4/5/05	ORDER: Final judgment filed per opinion. With costs: y. [04-1495, [*et al.*]] [1844987-1] (hard) [04-1495 [*et al.*]]
4/19/05	Filed 30c Petition for Rehearing and Petition for Rehearing Enbanc by Appellee Carl Kircher in 04-1495, Appellee Robert Brockway in 04-1495, Appellee Steve Dudley in 04-1496, Appellee Beth Dudley in 04-1496, Appellee Steve Dudley in 04-1608, Appellee Beth Dudley in 04-1608, Appellee T. K. Parthasarathy in 04-1628, Appellee Edmund Woodbury in 04-1628, Appellee Stuart A. Smith in 04-1628, Appellee Sharon Smith in 04-1628, Appellee Dorothy Luettinger in 04-1650, Appellee Robert Potter in 04-1650, Appellee Dorothy Luettinger in 04-1651, Appellee Robert Potter in 04-1651, Appellee Gary Vogeler in 04-1660, Appellee Gary Vogeler in 04-1661, Appellee Avery Jackson in 04-2162, Appellee Terry Spurgeon in 04-2687. Dist. [04-1495, [*et al.*]] [1850156-1] (amyd) [04-1495 [*et al.*]]
5/2/05	ORDER: Appellee Carl Kircher in 04-1495, Appellee Robert Brockway in 04-1495, Appellee Steve Dudley in 04-1496, Appellee Beth Dudley in

04-1496, Appellee Steve Dudley in 04-1608, Appellee Beth Dudley in 04-1608, Appellee T. K. Parthasarathy in 04-1628, Appellee Edmund Woodbury in 04-1628, Appellee Stuart A. Smith in 04-1628, Appellee Sharon Smith in 04-1628, Appellee Dorothy Luettinger in 04-1650, Appellee Robert Potter in 04-1650, Appellee Dorothy Luettinger in 04-1651, Appellee Robert Potter in 04-1651, Appellee Gary Vogeler in 04-1660, Appellee Gary Vogeler in 04-1661, Appellee Avery Jackson in 04-2162, Appellee Terry Spurgeon in 04-2687 Petition for Rehearing and Petition for Rehearing Enbanc is DENIED. [04-1495, [*et al.*]] [1850156-1] (fern) [04-1495 [*et al.*]]

5/10/05 MANDATE ISSUED AND ENTIRE RECORD RETURNED. (Contents returned: 12 vol. pleadings; 1 vol. loose pleadings; 2 vol. exhibits.) [04-1495, [*et al.*]] [1754123-1] (cove) [04-1495 [*et al.*]]

* * * * *

7/26/05 Notice from the Supreme Court that a motion for extension of time to file a Petition for Writ of Certiorari has been GRANTED, extending such time to 8/30/05. [1718486-1] [04-1495, [*et al.*]] (elea) [04-1495 [*et al.*]]

9/2/05 Notice from the Supreme Court that a motion for extension of time to file a Petition for Writ of Certiorari has been GRANTED, extending such time to 9/29/05. [1718486-1] [04-1495, [*et al.*]] (elea) [04-1495 [*et al.*]]

10/4/05	Filed notice from the Supreme Court of the filing of a Petition for Writ of Certiorari. Supreme Court Case No.: 05-409. [04-1495, [*et al.*]] [1908945-1] (elea) [04-1495 [*et al.*]]
1/23/06	Filed order from the Supreme Court, the Petition for Writ of Certiorari is GRANTED limited to question 1 presented by the petition. Supreme Court Case No.: 05-409. [04-1495, [*et al.*]] [1946536-1] (hudk) [04-1495 [*et al.*]]

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 04-1650

DOROTHY LUETTINGER AND ROBERT POTTER,
INDIVIDUALLY AND ON BEHALF OF ALL OTHERS
SIMILARLY SITUATED,
Plaintiffs-Appellees,

v.

SCUDDER INTERNATIONAL FUND, INC., ET AL.,
Defendants-Appellants.

DOCKET PROCEEDINGS

DATE	DOCKET ENTRY
3/17/04	Private civil case docketed. [04-1650] [1712569-1] Transcript information sheet due 3/29/04. Fee or IFP forms due on 3/31/04 for Scudder Int'l Fund, for Deutsche Investment. (amyd) [04-1650]
	* * * * *
3/19/04	ORDER: The court, on its own motion, orders these appeals CONSOLIDATED for purposes of briefing and disposition. [1718486-1] DW [04-1650, 04-1651], [1719137-2] Appellants shall file, on or before 4/1/04, a brief memorandum stating why this appeal should not be dismissed for lack of jurisdiction. A motion for volutary [*sic*] dismissal pursuant to FRAP 42(b) will statisfy [*sic*] this requirement. Briefing is SUSPENDED pending further court order. (See order

for further details) (amyd) [04-1650 04-1651]

* * * * *

4/1/04 Filed Appellant Scudder Int'l Fund in 04-1650, Appellant Deutsche Investment in 04-1650 jurisdictional memorandum. [04-1650, 04-1651] [1724166-1] (nath) [04-1650 04-1651]

* * * * *

4/26/04 ORDER: Filed clerk's notice to Appellee Dorothy Luettinger in 04-1650, Appellee Robert Potter in 04-1650, Appellee Dorothy Luettinger in 04-1651, Appellee Robert Potter in 04-1651 to file a response to APPELLANTS' MEMORANDUM addressing the jurisdictional issue raised in the court's order of 3/19/04. [1718527-1] DW [04-1650, 04-1651] Response due 5/3/04 for Robert Potter in 04-1650, for Dorothy Luettinger in 04-1650, for Robert Potter in 04-1651, for Dorothy Luettinger in 04-1651 (hard) [04-1650 04-1651]

5/3/04 Filed Appellee Dorothy Luettinger in 04-1650, Appellee Robert Potter in 04-1650, Appellee Dorothy Luettinger in 04-1651, Appellee Robert Potter in 04-1651 jurisdictional memorandum. [04-1650, 04-1651] [1734381-1] (nath) [04-1650 04-1651]

6/30/04 ORDER: This consolidated appeal is within our appellate jurisdiction and will proceed to briefing and decision on the merits. See Kircher v. Putnam Funds Trust, no. 04-1495, slip op. (7th Cir. June

29, 2004). DW [04-1650, 04-1651] (kell) [04-1650 04-1651]

* * * * *

7/14/04 ORDER: The court orders these appeals CONSOLIDATED for purposes of briefing and disposition: [1719008-1] DW [04-1495, [*et al.*]] 1. The appellants shall file a single, consolidated brief and required short appendix by 8/30/04. 2. The appellees shall file a single, consolidated brief by 10/4/04. 3. The appellants shall file a single, consolidated reply brief, if any, by 10/25/04. (hudk) [04-1495 [*et al.*]]

* * * * *

8/30/04 Filed 15c appellant's brief by Putnam Funds Trust in 04-1495, Putnam Investment in 04-1495, Putnam Int'l Equity in 04-1496, Putnam Investment in 04-1496, Putnam Investment in 04-1608, Putnam Investment Fu in 04-1608, Artisan Funds Inc in 04-1628, Artisan Partners in 04-1628, Scudder Int'l Fund in 04-1650, Deutsche Investment in 04-1650, Janus Investment Fun in 04-1651, Janus Capital Mgmt in 04-1651, Columbia Wanger in 04-1660, Columbia Acorn Trust in 04-1661, Van Kampen Series in 04-2162, Van Kampen Investmen in 04-2162, Pacific Life Insur C in 04-2687. Electronically Transmitted. [04-1495, [*et al.*]] [0-0] (andb) [04-1495 [*et al.*]]

8/30/04 Filed 10c appendix by Appellant Putnam Funds Trust in 04-1495, Appellant Putnam Investment in 04-1495, Appellant Putnam Int'l Equity in 04-1496, Appellant Putnam Investment in 04-1496, Appellant Putnam Investment in 04-1608,

Appellant Putnam Investment Fu in 04-1608, Appellant Artisan Funds Inc in 04-1628, Appellant Artisan Partners in 04-1628, Appellant Scudder Int'l Fund in 04-1650, Appellant Deutsche Investment in 04-1650, Appellant Janus Investment Fun in 04-1651, Appellant Janus Capital Mgmt in 04-1651, Appellant Columbia Wanger in 04-1660, Appellant Columbia Acorn Trust in 04-1661, Appellant Van Kampen Series in 04-2162, Appellant Van Kampen Investmen in 04-2162, Appellant Pacific Life Insur C in 04-2687. [04-1495, [*et al.*]] [1771540-1] (andb) [04-1495 [*et al.*]]

* * * * *

10/6/04 Filed 15c appellee's brief by Carl Kircher in 04-1495, Robert Brockway in 04-1495, Steve Dudley in 04-1496, Beth Dudley in 04-1496, Steve Dudley in 04-1608, Beth Dudley in 04-1608, T. K. Parthasarathy in 04-1628, Edmund Woodbury in 04-1628, Stuart A. Smith in 04-1628, Sharon Smith in 04-1628, Dorothy Luettinger in 04-1650, Robert Potter in 04-1650, Dorothy Luettinger in 04-1651, Robert Potter in 04-1651, Gary Vogeler in 04-1660, Gary Vogeler in 04-1661, Avery Jackson in 04-2162, Terry Spurgeon in 04-2687. Electronically Transmitted. [04-1495, [*et al.*]] [0-0] (andb) [04-1495 [*et al.*]]

10/25/04 Filed 15c appellant's reply brief by Putnam Funds Trust in 04-1495, Putnam Investment in 04-1495, Putnam Int'l Equity in 04-1496, Putnam Investment in 04-1496, Putnam Investment in 04-1608, Putnam Investment Fu in 04-1608, Arti-

	san Funds Inc in 04-1628, Artisan Partners in 04-1628, Scudder Int'l Fund in 04-1650, Deutsche Investment in 04-1650, Janus Investment Fun in 04-1651, Janus Capital Mgmt in 04-1651, Columbia Wanger in 04-1660, Columbia Acorn Trust in 04-1661, Van Kampen Series in 04-2162, Van Kampen Investmen in 04-2162, Pacific Life Insur C in 04-2687. Electronically Transmitted. [04-1495, [*et al.*]] [0-0] (andb) [04-1495 [*et al.*]]
10/26/04	ORDER issued GRANTING motion for stay. The district court's order remanding the case to state court is STAYED pending resolution of the appeal. [1776032-1] ERW [04-2687] (tiff) [04-2687]
	* * * * *
1/7/05	Case heard and taken under advisement by panel: Circuit Judge Frank H. Easterbrook, Circuit Judge Kenneth F. Ripple, Circuit Judge Diane P. Wood. [04-1495, [*et al.*]] [1814513-1] (kare) [04-1495 [*et al.*]]
	* * * * *
4/5/05	Filed opinion of the court by Judge Easterbrook. The judgments of the district court are REVERSED and the cases are REMANDED with instructions to undo the remand orders and dismiss plaintiffs' state-law claims. Circuit Judge Frank H. Easterbrook, Circuit Judge Kenneth F. Ripple, Circuit Judge Diane P. Wood. [04-1495, [*et al.*]] [1718486-1] (hard) [04-1495 [*et al.*]]

4/5/05 ORDER: Final judgment filed per opinion. With costs: y. [04-1495, [*et al.*]] [1844987-1] (hard) [04-1495 [*et al.*]]

4/19/05 Filed 30c Petition for Rehearing and Petition for Rehearing Enbanc by Appellee Carl Kircher in 04-1495, Appellee Robert Brockway in 04-1495, Appellee Steve Dudley in 04-1496, Appellee Beth Dudley in 04-1496, Appellee Steve Dudley in 04-1608, Appellee Beth Dudley in 04-1608, Appellee T. K. Parthasarathy in 04-1628, Appellee Edmund Woodbury in 04-1628, Appellee Stuart A. Smith in 04-1628, Appellee Sharon Smith in 04-1628, Appellee Dorothy Luettinger in 04-1650, Appellee Robert Potter in 04-1650, Appellee Dorothy Luettinger in 04-1651, Appellee Robert Potter in 04-1651, Appellee Gary Vogeler in 04-1660, Appellee Gary Vogeler in 04-1661, Appellee Avery Jackson in 04-2162, Appellee Terry Spurgeon in 04-2687. Dist. [04-1495, [*et al.*]] [1850156-1] (amyd) [04-1495 [*et al.*]]

5/2/05 ORDER: Appellee Carl Kircher in 04-1495, Appellee Robert Brockway in 04-1495, Appellee Steve Dudley in 04-1496, Appellee Beth Dudley in 04-1496, Appellee Steve Dudley in 04-1608, Appellee Beth Dudley in 04-1608, Appellee T. K. Parthasarathy in 04-1628, Appellee Edmund Woodbury in 04-1628, Appellee Stuart A. Smith in 04-1628, Appellee Sharon Smith in 04-1628, Appellee Dorothy Luettinger in 04-1650, Appellee Robert Potter in 04-1650, Appellee Dorothy Luettinger in 04-1651, Appellee Robert Potter in

04-1651, Appellee Gary Vogeler in 04-1660, Appellee Gary Vogeler in 04-1661, Appellee Avery Jackson in 04-2162, Appellee Terry Spurgeon in 04-2687 Petition for Rehearing and Petition for Rehearing Enbanc is DENIED. [04-1495, [*et al.*]] [1850156-1] (fern) [04-1495 [*et al.*]]

5/10/05 MANDATE ISSUED AND ENTIRE RECORD RETURNED. (Contents returned: 12 vol. pleadings; 1 vol. loose pleadings; 2 vol. exhibits.) [04-1495, [*et al.*]] [1754123-1] (cove) [04-1495 [*et al.*]]

* * * * *

7/26/05 Notice from the Supreme Court that a motion for extension of time to file a Petition for Writ of Certiorari has been GRANTED, extending such time to 8/30/05. [1718486-1] [04-1495, [*et al.*]] (elea) [04-1495 [*et al.*]]

9/2/05 Notice from the Supreme Court that a motion for extension of time to file a Petition for Writ of Certiorari has been GRANTED, extending such time to 9/29/05. [1718486-1] [04-1495, [*et al.*]] (elea) [04-1495 [*et al.*]]

10/4/05 Filed notice from the Supreme Court of the filing of a Petition for Writ of Certiorari. Supreme Court Case No.: 05-409. [04-1495, [*et al.*]] [1908945-1] (elea) [04-1495 [*et al.*]]

1/23/06 Filed order from the Supreme Court, the Petition for Writ of Certiorari is GRANTED limited to question 1 presented by the petition. Supreme Court

Case No.: 05-409. [04-1495, [*et al.*]] [1946536-1] (hudk) [04-1495 [*et al.*]]

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 04-1651

DOROTHY LUETTINGER AND ROBERT POTTER,
INDIVIDUALLY AND ON BEHALF OF ALL OTHERS
SIMILARLY SITUATED,
Plaintiffs-Appellees,

v.

JANUS INVESTMENT FUND, ET AL.,
Defendants-Appellants.

DOCKET PROCEEDINGS

DATE	DOCKET ENTRY
3/17/04	Private civil case docketed. [04-1651] [1718486-1] Transcript information sheet due 3/29/04. Fee or IFP forms due on 3/31/04 for Janus Investment Fun, for Janus Capital Mgmt. (amyd) [04-1651]
	* * * * *
3/17/04	Filed Appellant Janus Investment Fun in 04-1651, Appellant Janus Capital Mgmt 04-1651 jurisdictional memorandum. [04-1651] [1718539-1] (amyd) [04-1651]
3/19/04	ORDER: The court, on its own motion, orders these appeals CONSOLIDATED for purposes of briefing and disposition. [1718486-1] DW [04-1650, 04-1651] [1719137-2] Appellants shall file, on or before 4/1/04, a brief memorandum stating why this appeal should not be dismissed for lack of jurisdiction. A motion

for volutary [*sic*] dismissal pursuant to FRAP 42(b) will statisfy [*sic*] this requirement. Briefing is SUSPENDED pending further court order. (See order for further details) (amyd) [04-1650 04-1651]

* * * * *

4/1/04 Filed Appellant Scudder Int'l Fund in 04-1650, Appellant Deutsche Investment in 04-1650 jurisdictional memorandum. [04-1650, 04-1651] [1724166-1] (nath) [04-1650, 04-1651]

* * * * *

4/26/04 ORDER: Filed clerk's notice to Appellee Dorothy Luettinger in 04-1650, Appellee Robert Potter in 04-1650, Appellee Dorothy Luettinger in 04-1651, Appellee Robert Potter in 04-1651 to file a response to APPELLANTS' MEMORANDUM addressing the jurisdictional issue raised in the court's order of 3/19/04. [1718527-1] DW [04-1650, 04-1651] Response due 5/3/04 for Robert Potter in 04-1650, for Dorothy Luettinger in 04-1650, for Robert Potter in 04-1651, for Dorothy Luettinger in 04-1651 (hard) [04-1650 04-1651]

5/3/04 Filed Appellee Dorothy Luettinger in 04-1650, Appellee Robert Potter in 04-1650, Appellee Dorothy Luettinger in 04-1651, Appellee Robert Potter in 04-1651 jurisdictional memorandum. [04-1650, 04-1651] [1734381-1] (nath) [04-1650 04-1651]

6/30/04 ORDER: This consolidated appeal is within our appellate jurisdiction and will

proceed to briefing and decision on the merits. See Kircher v. Putnam Funds Trust, no. 04-1495, slip op. (7th Cir. June 29, 2004). DW [04-1650, 04-1651] (kell) [04-1650 04-1651]

* * * * *

7/14/04 ORDER: The court orders these appeals CONSOLIDATED for purposes of briefing and disposition: [1719008-1] DW [04-1495, [*et al.*]] 1. The appellants shall file a single, consolidated brief and required short appendix by 8/30/04. 2. The appellees shall file a single, consolidated brief by 10/4/04. 3. The appellants shall file a single, consolidated reply brief, if any, by 10/25/04. (hudk) [04-1495 [*et al.*]]

* * * * *

8/30/04 Filed 15c appellant's brief by Putnam Funds Trust in 04-1495, Putnam Investment in 04-1495, Putnam Int'l Equity in 04-1496, Putnam Investment in 04-1496, Putnam Investment in 04-1608, Putnam Investment Fu in 04-1608, Artisan Funds Inc in 04-1628, Artisan Partners in 04-1628, Scudder Int'l Fund in 04-1650, Deutsche Investment in 04-1650, Janus Investment Fun in 04-1651, Janus Capital Mgmt in 04-1651, Columbia Wanger in 04-1660, Columbia Acorn Trust in 04-1661, Van Kampen Series in 04-2162, Van Kampen Investmen in 04-2162, Pacific Life Insur C in 04-2687. Electronically Transmitted. [04-1495, [*et al.*]] [0-0] (andb) [04-1495 [*et al.*]]

8/30/04 Filed 10c appendix by Appellant Putnam Funds Trust in 04-1495, Appellant Putnam Investment in 04-1495, Appellant

Putnam Int'l Equity in 04-1496, Appellant Putnam Investment in 04-1496, Appellant Putnam Investment in 04-1608, Appellant Putnam Investment Fu in 04-1608, Appellant Artisan Funds Inc in 04-1628, Appellant Artisan Partners in 04-1628, Appellant Scudder Int'l Fund in 04-1650, Appellant Deutsche Investment in 04-1650, Appellant Janus Investment Fun in 04-1651, Appellant Janus Capital Mgmt in 04-1651, Appellant Columbia Wanger in 04-1660, Appellant Columbia Acorn Trust in 04-1661, Appellant Van Kampen Series in 04-2162, Appellant Van Kampen Investmen in 04-2162, Appellant Pacific Life Insur C in 04-2687. [04-1495, [*et al.*]] [1771540-1] (andb) [04-1495 [*et al.*]]

* * * * *

10/6/04 Filed 15c appellee's brief by Carl Kircher in 04-1495, Robert Brockway in 04-1495, Steve Dudley in 04-1496, Beth Dudley in 04-1496, Steve Dudley in 04-1608, Beth Dudley in 04-1608, T. K. Parthasarathy in 04-1628, Edmund Woodbury in 04-1628, Stuart A. Smith in 04-1628, Sharon Smith in 04-1628, Dorothy Luettinger in 04-1650, Robert Potter in 04-1650, Dorothy Luettinger in 04-1651, Robert Potter in 04-1651, Gary Vogeler in 04-1660, Gary Vogeler in 04-1661, Avery Jackson in 04-2162, Terry Spurgeon in 04-2687. Electronically Transmitted. [04-1495, [*et al.*]] [0-0] (andb) [04-1495 [*et al.*]]

10/25/04 Filed 15c appellant's reply brief by Putnam Funds Trust in 04-1495, Putnam Investment in 04-1495, Putnam Int'l Equity

in 04-1496, Putnam Investment in 04-1496, Putnam Investment in 04-1608, Putnam Investment Fu in 04-1608, Artisan Funds Inc in 04-1628, Artisan Partners in 04-1628, Scudder Int'l Fund in 04-1650, Deutsche Investment in 04-1650, Janus Investment Fun in 04-1651, Janus Capital Mgmt in 04-1651, Columbia Wanger in 04-1660, Columbia Acorn Trust in 04-1661, Van Kampen Series in 04-2162, Van Kampen Investmen in 04-2162, Pacific Life Insur C in 04-2687. Electronically Transmitted. [04-1495, [*et al.*]] [0-0] (andb) [04-1495 [*et al.*]]

10/26/04 ORDER issued GRANTING motion for stay. The district court's order remanding the case to state court is STAYED pending resolution of the appeal. [1776032-1] ERW [04-2687] (tiff) [04-2687]

* * * * *

1/7/05 Case heard and taken under advisement by panel: Circuit Judge Frank H. Easterbrook, Circuit Judge Kenneth F. Ripple, Circuit Judge Diane P. Wood. [04-1495, [*et al.*]] [1814513-1] (kare) [04-1495 [*et al.*]]

* * * * *

4/5/05 Filed opinion of the court by Judge Easterbrook. The judgments of the district court are REVERSED and the cases are REMANDED with instructions to undo the remand orders and dismiss plaintiffs' state-law claims. Circuit Judge Frank H. Easterbrook, Circuit Judge Kenneth F. Ripple, Circuit Judge Diane

P. Wood. [04-1495, [*et al.*]] [1718486-1] (hard) [04-1495 [*et al.*]]

4/5/05 ORDER: Final judgment filed per opinion. With costs: y. [04-1495, [*et al.*]] [1844987-1] (hard) [04-1495 [*et al.*]]

4/19/05 Filed 30c Petition for Rehearing and Petition for Rehearing Enbanc by Appellee Carl Kircher in 04-1495, Appellee Robert Brockway in 04-1495, Appellee Steve Dudley in 04-1496, Appellee Beth Dudley in 04-1496, Appellee Steve Dudley in 04-1608, Appellee Beth Dudley in 04-1608, Appellee T. K. Parthasarathy in 04-1628, Appellee Edmund Woodbury in 04-1628, Appellee Stuart A. Smith in 04-1628, Appellee Sharon Smith in 04-1628, Appellee Dorothy Luettinger in 04-1650, Appellee Robert Potter in 04-1650, Appellee Dorothy Luettinger in 04-1651, Appellee Robert Potter in 04-1651, Appellee Gary Vogeler in 04-1660, Appellee Gary Vogeler in 04-1661, Appellee Avery Jackson in 04-2162, Appellee Terry Spurgeon in 04-2687. Dist. [04-1495, [*et al.*]] [1850156-1] (amyd) [04-1495 [*et al.*]]

5/2/05 ORDER: Appellee Carl Kircher in 04-1495, Appellee Robert Brockway in 04-1495, Appellee Steve Dudley in 04-1496, Appellee Beth Dudley in 04-1496, Appellee Steve Dudley in 04-1608, Appellee Beth Dudley in 04-1608, Appellee T. K. Parthasarathy in 04-1628, Appellee Edmund Woodbury in 04-1628, Appellee Stuart A. Smith in 04-1628, Appellee Sharon Smith in 04-1628, Appellee Dorothy Luettinger in 04-1650, Appellee Robert Potter in

04-1650, Appellee Dorothy Luettinger in 04-1651, Appellee Robert Potter in 04-1651, Appellee Gary Vogeler in 04-1660, Appellee Gary Vogeler in 04-1661, Appellee Avery Jackson in 04-2162, Appellee Terry Spurgeon in 04-2687 Petition for Rehearing and Petition for Rehearing Enbanc is DEN. ED. [04-1495, [*et al.*]] [1850156-1] (fern) [04-1495 [*et al.*]]

5/10/05 MANDATE ISSUED AND ENTIRE RECORD RETURNED. (Contents returned: 12 vol. pleadings; 1 vol. loose pleadings; 2 vol. exhibits.) [04-1495, [*et al.*]] [1754123-1] (cove) [04-1495 [*et al.*]]

* * * * *

7/26/05 Notice from the Supreme Court that a motion for extension of time to file a Petition for Writ of Certiorari has been GRANTED, extending such time to 8/30/05. [1718486-1] [04-1495, [*et al.*]] (elea) [04-1495 [*et al.*]]

9/2/05 Notice from the Supreme Court that a motion for extension of time to file a Petition for Writ of Certiorari has been GRANTED, extending such time to 9/29/05. [1718486-1] [04-1495, [*et al.*]] (elea) [04-1495 [*et al.*]]

10/4/05 Filed notice from the Supreme Court of the filing of a Petition for Writ of Certiorari. Supreme Court Case No.: 05-409. [04-1495, [*et al.*]] [1908945-1] (elea) [04-1495 [*et al.*]]

1/23/06 Filed order from the Supreme Court, the Petition for Writ of Certiorari is GRANTED limited to question 1 pre-

sented by the petition. Supreme Court Case No.: 05-409. [04-1495, [*et al.*]] [1946536-1] (hudk) [04-1495 [*et al.*]]

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 04-1660

GARY VOGELER, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Plaintiff-Appellee,

v.

COLUMBIA WANGER ASSET MANAGEMENT L.P.,
Defendant-Appellant.

DOCKET PROCEEDINGS

DATE	DOCKET ENTRY
3/18/04	Private civil case docketed. [04-1660] [1718839-1] Transcript information sheet due 3/29/04. Fee or IFP forms due on 4/1/04 for Columbia Wanger. Docketing Statement due 3/18/04. (fern) [04-1660]
	* * * * *
3/22/04	ORDER: The court, on its own motion, orders these appeals CONSOLIDATED for purposes of briefing and disposition. [1719008-1] DW [04-1660, 04-1661] [1719593-2] The appellant shall file, on or before April 2, 2004, a brief memorandum stating why this appeal should not be dismissed for lack of jurisdiction. A motion for voluntary dismissal pursuant to Fed. R. App. P. 42(b) will satisfy this requirement. Briefing is SUSPENDED pending further court order. (See order for further details) Jurisdictional memorandum due 4/2/04 for Columbia Wanger

in 04-1660, for Columbia Acorn Trust in 04-1661. (amyd) [04-1660 04-1661]

* * * * *

4/2/04 Filed Appellant Columbia Wanger in 04-1660 jurisdictional memorandum, per this court's 3/22/04. [04-1660] [1724372-1] (julr) [04-1660]

4/2/04 Filed Appellant Columbia Acorn Trust in 04-1661 jurisdictional memorandum. [04-1661, 04-1660] [1724667-1] (hard) [04-1660 04-1661]

* * * * *

6/30/04 ORDER: This consolidated appeal is within our appellate jurisdiction and will proceed to briefing and decision on the merits. See Kircher v. Putnam Funds Trust, no. 04-1495, slip op. (7th Cir. June 29, 2004). DW [04-1660, 04-1661] (kell) [04-1660 04-1661]

* * * * *

7/14/04 ORDER: The court orders these appeals CONSOLIDATED for purposes of briefing and disposition: [1719008-1] DW [04-1495, [*et al.*]] 1. The appellants shall file a single, consolidated brief and required short appendix by 8/30/04. 2. The appellees shall file a single, consolidated brief by 10/4/04. 3. The appellants shall file a single, consolidated reply brief, if any, by 10/25/04. (hudk) [04-1495 [*et al.*]]

* * * * *

8/30/04 Filed 15c appellant's brief by Putnam Funds Trust in 04-1495, Putnam Investment in 04-1495, Putnam Int'l Equity in 04-1496, Putnam Investment in 04-1496,

Putnam Investment in 04-1608, Putnam Investment Fu in 04-1608, Artisan Funds Inc in 04-1628, Artisan Partners in 04-1628, Scudder Int'l Fund in 04-1650, Deutsche Investment in 04-1650, Janus Investment Fun in 04-1651, Janus Capital Mgmt in 04-1651, Columbia Wanger in 04-1660, Columbia Acorn Trust in 04-1661, Van Kampen Series in 04-2162, Van Kampen Investmen in 04-2162, Pacific Life Insur C in 04-2687. Electronically Transmitted. [04-1495, [*et al.*]] [0-0] (andb) [04-1495 [*et al.*]]

8/30/04 Filed 10c appendix by Appellant Putnam Funds Trust in 04-1495, Appellant Putnam Investment in 04-1495, Appellant Putnam Int'l Equity in 04-1496, Appellant Putnam Investment in 04-1496, Appellant Putnam Investment in 04-1608, Appellant Putnam Investment Fu in 04-1608, Appellant Artisan Funds Inc in 04-1628, Appellant Artisan Partners in 04-1628, Appellant Scudder Int'l Fund in 04-1650, Appellant Deutsche Investment in 04-1650, Appellant Janus Investment Fun in 04-1651, Appellant Janus Capital Mgmt in 04-1651, Appellant Columbia Wanger in 04-1660, Appellant Columbia Acorn Trust in 04-1661, Appellant Van Kampen Series in 04-2162, Appellant Van Kampen Investmen in 04-2162, Appellant Pacific Life Insur C in 04-2687. [04-1495, [*et al.*]] [1771540-1] (andb) [04-1495 [*et al.*]]

* * * * *

10/6/04 Filed 15c appellee's brief by Carl Kircher in 04-1495, Robert Brockway in 04-1495, Steve Dudley in 04-1496, Beth Dudley in

04-1496, Steve Dudley in 04-1608, Beth Dudley in 04-1608, T. K. Parthasarathy in 04-1628, Edmund Woodbury in 04-1628, Stuart A. Smith in 04-1628, Sharon Smith in 04-1628, Dorothy Luettinger in 04-1650, Robert Potter in 04-1650, Dorothy Luettinger in 04-1651, Robert Potter in 04-1651, Gary Vogeler in 04-1660, Gary Vogeler in 04-1661, Avery Jackson in 04-2162, Terry Spurgeon in 04-2687. Electronically Transmitted. [04-1495, [*et al.*]] [0-0] (andb) [04-1495 [*et al.*]]

10/25/04 Filed 15c appellant's reply brief by Putnam Funds Trust in 04-1495, Putnam Investment in 04-1495, Putnam Int'l Equity in 04-1496, Putnam Investment in 04-1496, Putnam Investment in 04-1608, Putnam Investment Fu in 04-1608, Artisan Funds Inc in 04-1628, Artisan Partners in 04-1628, Scudder Int'l Fund in 04-1650, Deutsche Investment in 04-1650, Janus Investment Fun in 04-1651, Janus Capital Mgmt in 04-1651, Columbia Wanger in 04-1660, Columbia Acorn Trust in 04-1661, Van Kampen Series in 04-2162, Van Kampen Investmen in 04-2162, Pacific Life Insur C in 04-2687. Electronically Transmitted. [04-1495, [*et al.*]] [0-0] (andb) [04-1495 [*et al.*]]

10/26/04 ORDER issued GRANTING motion for stay. The district court's order remanding the case to state court is STAYED pending resolution of the appeal. [1776032-1] ERW [04-2687] (tiff) [04-2687]

* * * * *

1/7/05	Case heard and taken under advisement by panel: Circuit Judge Frank H. Easterbrook, Circuit Judge Kenneth F. Ripple, Circuit Judge Diane P. Wood. [04-1495, [*et al.*]] [1814513-1] (kare) [04-1495 [*et al.*]]

* * * * *

4/5/05	Filed opinion of the court by Judge Easterbrook. The judgments of the district court are REVERSED and the cases are REMANDED with instructions to undo the remand orders and dismiss plaintiffs' state-law claims. Circuit Judge Frank H. Easterbrook, Circuit Judge Kenneth F. Ripple, Circuit Judge Diane P. Wood. [04-1495, [*et al.*]] [1718486-1] (hard) [04-1495 [*et al.*]]
4/5/05	ORDER: Final judgment filed per opinion. With costs: y. [04-1495, [*et al.*]] [1844987-1] (hard) [04-1495 [*et al.*]]
4/19/05	Filed 30c Petition for Rehearing and Petition for Rehearing Enbanc by Appellee Carl Kircher in 04-1495, Appellee Robert Brockway in 04-1495, Appellee Steve Dudley in 04-1496, Appellee Beth Dudley in 04-1496, Appellee Steve Dudley in 04-1608, Appellee Beth Dudley in 04-1608, Appellee T. K. Parthasarathy in 04-1628, Appellee Edmund Woodbury in 04-1628, Appellee Stuart A. Smith in 04-1628, Appellee Sharon Smith in 04-1628, Appellee Dorothy Luettinger in 04-1650, Appellee Robert Potter in 04-1650, Appellee Dorothy Luettinger in 04-1651, Appellee Robert Potter in 04-1651, Appellee Gary Vogeler in 04-1660, Appellee Gary Vogeler in

04-1661, Appellee Avery Jackson in 04-2162, Appellee Terry Spurgeon in 04-2687. Dist. [04-1495, [*et al.*]] [1850156-1] (amyd) [04-1495 [*et al.*]]

5/2/05 ORDER: Appellee Carl Kircher in 04-1495, Appellee Robert Brockway in 04-1495, Appellee Steve Dudley in 04-1496, Appellee Beth Dudley in 04-1496, Appellee Steve Dudley in 04-1608, Appellee Beth Dudley in 04-1608, Appellee T. K. Parthasarathy in 04-1628, Appellee Edmund Woodbury in 04-1628, Appellee Stuart A. Smith in 04-1628, Appellee Sharon Smith in 04-1628, Appellee Dorothy Luettinger in 04-1650, Appellee Robert Potter in 04-1650, Appellee Dorothy Luettinger in 04-1651, Appellee Robert Potter in 04-1651, Appellee Gary Vogeler in 04-1660, Appellee Gary Vogeler in 04-1661, Appellee Avery Jackson in 04-2162, Appellee Terry Spurgeon in 04-2687 Petition for Rehearing and Petition for Rehearing Enbanc is DENIED. [04-1495, [*et al.*]] [1850156-1] (fern) [04-1495 [*et al.*]]

5/10/05 MANDATE ISSUED AND ENTIRE RECORD RETURNED. (Contents returned: 12 vol. pleadings; 1 vol. loose pleadings; 2 vol. exhibits.) [04-1495, [*et al.*]] [1754123-1] (cove) [04-1495 [*et al.*]]

* * * * *

7/26/05 Notice from the Supreme Court that a motion for extension of time to file a Petition for Writ of Certiorari has been GRANTED, extending such time to

8/30/05. [1718486-1] [04-1495, [*et al.*]] (elea) [04-1495 [*et al.*]]

9/2/05 Notice from the Supreme Court that a motion for extension of time to file a Petition for Writ of Certiorari has been GRANTED, extending such time to 9/29/05. [1718486-1] [04-1495, [*et al.*]] (elea) [04-1495 [*et al.*]]

10/4/05 Filed notice from the Supreme Court of the filing of a Petition for Writ of Certiorari. Supreme Court Case No.: 05-409. [04-1495, [*et al.*]] [1908945-1] (elea) [04-1495 [*et al.*]]

1/23/06 Filed order from the Supreme Court, the Petition for Writ of Certiorari is GRANTED limited to question 1 presented by the petition. Supreme Court Case No.: 05-409. [04-1495, [*et al.*]] [1946536-1] (hudk) [04-1495 [*et al.*]]

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 04-1661

GARY VOGELER, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Plaintiff-Appellee,

v.

COLUMBIA ACORN TRUST,
Defendant-Appellant.

DOCKET PROCEEDINGS

DATE	DOCKET ENTRY
3/18/04	Private civil case docketed. [04-1661] [1718839-1] Transcript information sheet due 3/29/04. Fee or IFP forms due on 4/1/04 for Columbia Acorn Trust. Docketing Statement due 3/18/04. (fern) [04-1661]
	* * * * *
3/22/04	ORDER: The court, on its own motion, orders these appeals CONSOLIDATED for purposes of briefing and disposition. [1719008-1] DW [04-1660, 04-1661] [1719593-2] The appellant shall file, on or before April 2, 2004, a brief memorandum stating why this appeal should not be dismissed for lack of jurisdiction. A motion for voluntary dismissal pursuant to Fed. R. App. P. 42(b) will satisfy this requirement. Briefing is SUSPENDED pending further court order. (See order for further details) Jurisdictional memo-

randum due 4/2/04 for Columbia Wanger in 04-1660, for Columbia Acorn Trust in 04-1661. (amyd) [04-1660 04-1661]

* * * * *

4/2/04 Filed Appellant Columbia Wanger in 04-1660 jurisdictional memorandum, per this court's 3/22/04. [04-1660] [1724372-1] (julr) [04-1660]

4/2/04 Filed Appellant Columbia Acorn Trust in 04-1661 jurisdictional memorandum. [04-1661, 04-1660] [1724667-1] (hard) [04-1660 04-1661]

* * * * *

6/30/04 ORDER: This consolidated appeal is within our appellate jurisdiction and will proceed to briefing and decision on the merits. See Kircher v. Putnam Funds Trust, no. 04-1495, slip op. (7th Cir. June 29, 2004). DW [04-1660, 04-1661] (kell) [04-1660 04-1661]

* * * * *

7/14/04 ORDER: The court orders these appeals CONSOLIDATED for purposes of briefing and disposition: [1719008-1] DW [04-1495, [*et al.*]] 1. The appellants shall file a single, consolidated brief and required short appendix by 8/30/04. 2. The appellees shall file a single, consolidated brief by 10/4/04. 3. The appellants shall file a single, consolidated reply brief, if any, by 10/25/04. (hudk) [04-1495 [*et al.*]]

* * * * *

8/30/04 Filed 15c appellant's brief by Putnam Funds Trust in 04-1495, Putnam Investment in 04-1495, Putnam Int'l Equity in

04-1496, Putnam Investment in 04-1496, Putnam Investment in 04-1608, Putnam Investment Fu in 04-1608, Artisan Funds Inc in 04-1628, Artisan Partners in 04-1628, Scudder Int'l Fund in 04-1650, Deutsche Investment in 04-1650, Janus Investment Fun in 04-1651, Janus Capital Mgmt in 04-1651, Columbia Wanger in 04-1660, Columbia Acorn Trust in 04-1661, Van Kampen Series in 04-2162, Van Kampen Investmen in 04-2162, Pacific Life Insur C in 04-2687. Electronically Transmitted. [04-1495, [*et al.*]] [0-0] (andb) [04-1495 [*et al.*]]

8/30/04 Filed 10c appendix by Appellant Putnam Funds Trust in 04-1495, Appellant Putnam Investment in 04-1495, Appellant Putnam Int'l Equity in 04-1496, Appellant Putnam Investment in 04-1496, Appellant Putnam Investment in 04-1608, Appellant Putnam Investment Fu in 04-1608, Appellant Artisan Funds Inc in 04-1628, Appellant Artisan Partners in 04-1628, Appellant Scudder Int'l Fund in 04-1650, Appellant Deutsche Investment in 04-1650, Appellant Janus Investment Fun in 04-1651, Appellant Janus Capital Mgmt in 04-1651, Appellant Columbia Wanger in 04-1660, Appellant Columbia Acorn Trust in 04-1661, Appellant Van Kampen Series in 04-2162, Appellant Van Kampen Investmen in 04-2162, Appellant Pacific Life Insur C in 04-2687. [04-1495, [*et al.*]] [1771540-1] (andb) [04-1495 [*et al.*]]

* * * * *

10/6/04 Filed 15c appellee's brief by Carl Kircher in 04-1495, Robert Brockway in 04-1495,

Steve Dudley in 04-1496, Beth Dudley in 04-1496, Steve Dudley in 04-1608, Beth Dudley in 04-1608, T. K. Parthasarathy in 04-1628, Edmund Woodbury in 04-1628, Stuart A. Smith in 04-1628, Sharon Smith in 04-1628, Dorothy Luettinger in 04-1650, Robert Potter in 04-1650, Dorothy Luettinger in 04-1651, Robert Potter in 04-1651, Gary Vogeler in 04-1660, Gary Vogeler in 04-1661, Avery Jackson in 04-2162, Terry Spurgeon in 04-2687. Electronically Transmitted. [04-1495, [*et al.*]] [0-0] (andb) [04-1495 [*et al.*]]

10/25/04 Filed 15c appellant's reply brief by Putnam Funds Trust in 04-1495, Putnam Investment in 04-1495, Putnam Int'l Equity in 04-1496, Putnam Investment in 04-1496, Putnam Investment in 04-1608, Putnam Investment Fu in 04-1608, Artisan Funds Inc in 04-1628, Artisan Partners in 04-1628, Scudder Int'l Fund in 04-1650, Deutsche Investment in 04-1650, Janus Investment Fun in 04-1651, Janus Capital Mgmt in 04-1651, Columbia Wanger in 04-1660, Columbia Acorn Trust in 04-1661, Van Kampen Series in 04-2162, Van Kampen Investmen in 04-2162, Pacific Life Insur C in 04-2687. Electronically Transmitted. [04-1495, [*et al.*]] [0-0] (andb) [04-1495 [*et al.*]]

10/26/04 ORDER issued GRANTING motion for stay. The district court's order remanding the case to state court is STAYED pending resolution of the appeal. [1776032-1] ERW [04-2687] (tiff) [04-2687]

* * * * *

1/7/05 Case heard and taken under advisement by panel: Circuit Judge Frank H. Easterbrook, Circuit Judge Kenneth F. Ripple, Circuit Judge Diane P. Wood. [04-1495, [*et al.*]] [1814513-1] (kare) [04-1495 [*et al.*]]

* * * * *

4/5/05 Filed opinion of the court by Judge Easterbrook. The judgments of the district court are REVERSED and the cases are REMANDED with instructions to undo the remand orders and dismiss plaintiffs' state-law claims. Circuit Judge Frank H. Easterbrook, Circuit Judge Kenneth F. Ripple, Circuit Judge Diane P. Wood. [04-1495, [*et al.*]] [1718486-1] (hard) [04-1495 [*et al.*]]

4/5/05 ORDER: Final judgment filed per opinion. With costs: y. [04-1495, [*et al.*]] [1844987-1] (hard) [04-1495 [*et al.*]]

4/19/05 Filed 30c Petition for Rehearing and Petition for Rehearing Enbanc by Appellee Carl Kircher in 04-1495, Appellee Robert Brockway in 04-1495, Appellee Steve Dudley in 04-1496, Appellee Beth Dudley in 04-1496, Appellee Steve Dudley in 04-1608, Appellee Beth Dudley in 04-1608, Appellee T. K. Parthasarathy in 04-1628, Appellee Edmund Woodbury in 04-1628, Appellee Stuart A. Smith in 04-1628, Appellee Sharon Smith in 04-1628, Appellee Dorothy Luettinger in 04-1650, Appellee Robert Potter in 04-1650, Appellee Dorothy Luettinger in 04-1651, Appellee Robert Potter in 04-1651, Appellee Gary Vogeler in 04-1660, Appellee Gary Vogeler in

04-1661, Appellee Avery Jackson in 04-2162, Appellee Terry Spurgeon in 04-2687. Dist. [04-1495, [*et al.*]] [1850156-1] (amyd) [04-1495 [*et al.*]]

5/2/05 ORDER: Appellee Carl Kircher in 04-1495, Appellee Robert Brockway in 04-1495, Appellee Steve Dudley in 04-1496, Appellee Beth Dudley in 04-1496, Appellee Steve Dudley in 04-1608, Appellee Beth Dudley in 04-1608, Appellee T. K. Parthasarathy in 04-1628, Appellee Edmund Woodbury in 04-1628, Appellee Stuart A. Smith in 04-1628, Appellee Sharon Smith in 04-1628, Appellee Dorothy Luettinger in 04-1650, Appellee Robert Potter in 04-1650, Appellee Dorothy Luettinger in 04-1651, Appellee Robert Potter in 04-1651, Appellee Gary Vogeler in 04-1660, Appellee Gary Vogeler in 04-1661, Appellee Avery Jackson in 04-2162, Appellee Terry Spurgeon in 04-2687 Petition for Rehearing and Petition for Rehearing Enbanc is DENIED. [04-1495, [*et al.*]] [1850156-1] (fern) [04-1495 [*et al.*]]

5/10/05 MANDATE ISSUED AND ENTIRE RECORD RETURNED. (Contents returned: 12 vol. pleadings; 1 vol. loose pleadings; 2 vol. exhibits.) [04-1495, [*et al.*]] [1754123-1] (cove) [04-1495 [*et al.*]]

* * * * *

7/26/05 Notice from the Supreme Court that a motion for extension of time to file a Petition for Writ of Certiorari has been GRANTED, extending such time to

8/30/05. [1718486-1] [04-1495, [*et al.*]] (elea) [04-1495 [*et al.*]]

9/2/05 Notice from the Supreme Court that a motion for extension of time to file a Petition for Writ of Certiorari has been GRANTED, extending such time to 9/29/05. [1718486-1] [04-1495, [*et al.*]] (elea) [04-1495 [*et al.*]]

10/4/05 Filed notice from the Supreme Court of the filing of a Petition for Writ of Certiorari. Supreme Court Case No.: 05-409. [04-1495, [*et al.*]] [1908945-1] (elea) [04-1495 [*et al.*]]

1/23/06 Filed order from the Supreme Court, the Petition for Writ of Certiorari is GRANTED limited to question 1 presented by the petition. Supreme Court Case No.: 05-409. [04-1495, [*et al.*]] [1946536-1] (hudk) [04-1495 [*et al.*]]

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 04-2162

AVERY JACKSON, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Plaintiff-Appellee,

v.

VAN KAMPEN SERIES FUND, INC., ET AL.,
Defendants-Appellants.

DOCKET PROCEEDINGS

DATE	DOCKET ENTRY
5/5/04	Private civil case docketed. [04-2162] [1735018-1] Transcript information sheet due 5/17/04. Appellant's brief due 6/14/04 for Van Kampen Series, for Van Kampen Investmen. Docketing Statement due 5/7/04. (tiff) [04-2162]
	* * * * *
5/14/04	ORDER: Appellant Van Kampen Series, Appellant Van Kampen Investmen shall file a brief memorandum stating why this appeal should not be dismissed for lack of jurisdiction. A motion for voluntary dismissal pursuant to FRAP 42(b) will satisfy this requirement. [1735018-1] DW [04-2162] [1740430-1] Briefing is SUSPENDED pending further court order. (See order for further details) Jurisdictional memorandum due 5/21/04 for Van Kampen Investmen, for Van Kampen Series. (tiff) [04-2162]

5/21/04 Filed Appellant Van Kampen Series, Appellant Van Kampen Investmen jurisdictional memorandum. [04-2162] [1740128-1] (nath) [04-2162]

* * * * *

6/30/04 ORDER: This appeal within [*sic*] our appellate jurisdiction and will proceed briefing [*sic*] and decision on the merits. See Kircher v. Putnam Funds Trust, No. 04-1495, slip op. (7th Cir. June 29, 2004). DW [04-2162] (tiff) [04-2162]

* * * * *

7/14/04 ORDER: The court orders these appeals CONSOLIDATED for purposes of briefing and disposition: [1719008-1] DW [04-1495, [*et al.*]] 1. The appellants shall file a single, consolidated brief and required short appendix by 8/30/04. 2. The appellees shall file a single, consolidated brief by 10/4/04. 3. The appellants shall file a single, consolidated reply brief, if any, by 10/25/04. (hudk) [04-1495 [*et al.*]]

* * * * *

8/30/04 Filed 15c appellant's brief by Putnam Funds Trust in 04-1495, Putnam Investment in 04-1495, Putnam Int'l Equity in 04-1496, Putnam Investment in 04-1496, Putnam Investment in 04-1608, Putnam Investment Fu in 04-1608, Artisan Funds Inc in 04-1628, Artisan Partners in 04-1628, Scudder Int'l Fund in 04-1650, Deutsche Investment in 04-1650, Janus Investment Fun in 04-1651, Janus Capital Mgmt in 04-1651, Columbia Wanger in 04-1660, Columbia Acorn Trust in 04-1661, Van Kampen Series in 04-2162,

Van Kampen Investmen in 04-2162, Pacific Life Insur C in 04-2687. Electronically Transmitted. [04-1495, [*et al.*]] [0-0] (andb) [04-1495 [*et al.*]]

8/30/04 Filed 10c appendix by Appellant Putnam Funds Trust in 04-1495, Appellant Putnam Investment in 04-1495, Appellant Putnam Int'l Equity in 04-1496, Appellant Putnam Investment in 04-1496, Appellant Putnam Investment in 04-1608, Appellant Putnam Investment Fu in 04-1608, Appellant Artisan Funds Inc in 04-1628, Appellant Artisan Partners in 04-1628, Appellant Scudder Int'l Fund in 04-1650, Appellant Deutsche Investment in 04-1650, Appellant Janus Investment Fun in 04-1651, Appellant Janus Capital Mgmt in 04-1651, Appellant Columbia Wanger in 04-1660, Appellant Columbia Acorn Trust in 04-1661, Appellant Van Kampen Series in 04-2162, Appellant Van Kampen Investmen in 04-2162, Appellant Pacific Life Insur C in 04-2687. [04-1495, [*et al.*]] [1771540-1] (andb) [04-1495 [*et al.*]]

* * * * *

9/21/04 ORDER: Plaintiffs have initiated discovery, which the state judge has declined to stay pending the outcome of the appeal. Van Kampen seeks a stay from us. We issue the requested stay on the authority of 15 U.S.C. §77z-1(b)(4), which operates as an exception to the Anti-Injunction Act. Accordingly, plaintiffs are prohibited from seeking or taking any discovery in this litigation. If the remand order should be affirmed, the stay will terminate automatically when this court issues

its mandate. [1775291-1] LAB [04-2162] (amyd) [04-2162]

* * * * *

10/6/04 Filed 15c appellee's brief by Carl Kircher in 04-1495, Robert Brockway in 04-1495, Steve Dudley in 04-1496, Beth Dudley in 04-1496, Steve Dudley in 04-1608, Beth Dudley in 04-1608, T. K. Parthasarathy in 04-1628, Edmund Woodbury in 04-1628, Stuart A. Smith in 04-1628, Sharon Smith in 04-1628, Dorothy Luettinger in 04-1650, Robert Potter in 04-1650, Dorothy Luettinger in 04-1651, Robert Potter in 04-1651, Gary Vogeler in 04-1660, Gary Vogeler in 04-1661, Avery Jackson in 04-2162, Terry Spurgeon in 04-2687. Electronically Transmitted. [04-1495, [*et al.*]] [0-0] (andb) [04-1495 [*et al.*]]

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10/26/04	ORDER issued GRANTING motion for stay. The district court's order remanding the case to state court is STAYED pending resolution of the appeal. [1776032-1] ERW [04-2687] (tiff) [04-2687]
	* * * * *
1/7/05	Case heard and taken under advisement by panel: Circuit Judge Frank H. Easterbrook, Circuit Judge Kenneth F. Ripple, Circuit Judge Diane P. Wood. [04-1495, [*et al.*]] [1814513-1] (kare) [04-1495 [*et al.*]]
	* * * * *
4/5/05	Filed opinion of the court by Judge Easterbrook. The judgments of the district court are REVERSED and the cases are REMANDED with instructions to undo the remand orders and dismiss plaintiffs' state-law claims. Circuit Judge Frank H. Easterbrook, Circuit Judge Kenneth F. Ripple, Circuit Judge Diane P. Wood. [04-1495, [*et al.*]] [1718486-1] (hard) [04-1495 [*et al.*]]
4/5/05	ORDER: Final judgment filed per opinion. With costs: y. [04-1495, [*et al.*]] [1844987-1] (hard) [04-1495 [*et al.*]]
4/19/05	Filed 30c Petition for Rehearing and Petition for Rehearing Enbanc by Appellee Carl Kircher in 04-1495, Appellee Robert Brockway in 04-1495, Appellee Steve Dudley in 04-1496, Appellee Beth Dudley in 04-1496, Appellee Steve Dudley in 04-1608, Appellee Beth Dudley in 04-1608, Appellee T. K. Parthasarathy in 04-1628, Appellee Edmund Woodbury in 04-1628, Appellee Stuart A. Smith in

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* * * * *

7/26/05	Notice from the Supreme Court that a motion for extension of time to file a Petition for Writ of Certiorari has been GRANTED, extending such time to 8/30/05. [1718486-1] [04-1495, [*et al.*]] (elea) [04-1495 [*et al.*]]
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UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 04-2687

TERRY SPURGEON, AS CUSTODIAN FOR THE BENEFIT OF JAMES E. SPURGEON, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Plaintiff-Appellee,

v.

PACIFIC LIFE INSURANCE COMPANY,
Defendant-Appellant.

DOCKET PROCEEDINGS

DATE	DOCKET ENTRY
7/6/04	Private civil case docketed. [04-2687] [1754123-1] Transcript information sheet due 7/16/04. Appellant's brief due 8/16/04 for Pacific Life Insur C. Docketing Statement due 7/8/04. (amyd) [04-2687]
	* * * * *
7/14/04	ORDER: The court orders these appeals CONSOLIDATED for purposes of briefing and disposition: [1719008-1] DW [04-1495, [*et al.*]] 1. The appellants shall file a single, consolidated brief and required short appendix by 8/30/04. 2. The appellees shall file a single, consolidated brief by 10/4/04. 3. The appellants shall file a single, consolidated reply brief, if any, by 10/25/04. (hudk) [04-1495 [*et al.*]]
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pending resolution of the appeal. [1776032-1] ERW [04-2687] (tiff) [04-2687]

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1/7/05 Case heard and taken under advisement by panel: Circuit Judge Frank H. Easterbrook, Circuit Judge Kenneth F. Ripple, Circuit Judge Diane P. Wood. [04-1495, [*et al.*]] [1814513-1] (kare) [04-1495 [*et al.*]]

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4/5/05 Filed opinion of the court by Judge Easterbrook. The judgments of the district court are REVERSED and the cases are REMANDED with instructions to undo the remand orders and dismiss plaintiffs' state-law claims. Circuit Judge Frank H. Easterbrook, Circuit Judge Kenneth F. Ripple, Circuit Judge Diane P. Wood. [04-1495, [*et al.*]] [1718486-1] (hard) [04-1495 [*et al.*]]

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7/26/05	Notice from the Supreme Court that a motion for extension of time to file a Petition for Writ of Certiorari has been GRANTED, extending such time to 8/30/05. [1718486-1] [04-1495, [*et al.*]] (elea) [04-1495 [*et al.*]]
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(12)

FILED
FEB 21 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 05-409

IN THE

Supreme Court of the United States

CARL KIRCHER, ET AL.,
Petitioners,

v.

PUTNAM FUNDS TRUST, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

JOINT APPENDIX
(Volume II of II – Pages 166-435)

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February 21, 2006

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CERTIORARI GRANTED: JANUARY 6, 2006

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Putnam Investment Funds,
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Scudder International Fund, Inc.

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Van Kampen Investment Advisory
Corporation

TABLE OF CONTENTS

Page

VOLUME I

Relevant Docket Entries:

Third Judicial Circuit Court of Madison County, Illinois:

Parthasarathy, et al. v. T. Rowe Price International Funds, Inc., et al., Cause No. 03-L-1253 1

Potter, et al. v. Janus Investment Fund, et al., Cause No. 03-L-1254 6

Kircher, et al. v. Putnam Funds Trust, et al., Cause No. 03-L-1255 12

Dudley, et al. v. Putnam International Equity Fund, et al., Cause No. 03-L-1539 17

Dudley, et al. v. Putnam Investment Funds, et al., Cause No. 03-L-1540 21

Vogeler v. Columbia Acorn Trust, et al., Cause No. 03-L-1550 25

Jackson v. Van Kampen Series Fund, Inc., et al., Cause No. 03-L-2036 30

Spurgeon v. Pacific Life Insurance Co., Cause No. 04-L-241 34

United States District Court for the Southern District of Illinois (East St. Louis):

Parthasarathy, et al. v. T. Rowe Price International Funds, Inc., et al., Civil No. 03-CV-673-DRH 37

Kircher, et al. v. Putnam Funds Trust, et al., Civil No. 03-CV-691-DRH 46

Potter, et al. v. Janus Investment Fund, et al., Civil No. 03-CV-692-DRH 52

Potter, et al. v. Janus Investment Fund, et al., Civil No. 03-CV-693-DRH 59

Vogeler v. Columbia Acorn Trust, et al., Civil No. 03-CV-843-DRH 62

Dudley, et al. v. Putnam International Equity Fund, et al., Civil No. 03-CV-852-GPM 67

Dudley, et al. v. Putnam Investment Funds, et al., Civil No. 03-CV-853-GPM 72

Jackson v. Van Kampen Series Fund, Inc., et al., Civil No. 04-CV-56-DRH 78

Spurgeon, etc. v. Pacific Life Insurance Co., et al., Civil No. 04-CV-355-MJR 82

United States Court of Appeals for the Seventh Circuit:

Kircher, et al. v. Putnam Funds Trust, et al., No. 04-1495 89

Dudley, et al. v. Putnam International Equity Fund, et al., No. 04-1496 98

Dudley, et al. v. Putnam Investment Management, LLC, et al., No. 04-1608 107

Parthasarathy, et al. v. Artisan Funds, Inc., et al., No. 04-1628 116

Luettinger, et al. v. Scudder International Fund, Inc., et al., No. 04-1650 123

Luettinger, et al. v. Janus Investment Fund, et al., No. 04-1651 131

Vogeler v. Columbia Wanger Asset Management L.P., et al., No. 04-1660 139

Vogeler v. Columbia Acorn Trust, No. 04-1661 146

Jackson v. Van Kampen Series Fund, Inc., et al., No. 04-2162 153

Spurgeon, etc. v. Pacific Life Insurance Co., et al., No. 04--2687 160

VOLUME II

Complaints:

Complaint, *Potter, et al. v. Janus Investment Fund, et al.*, Cause No. 03-L-1254 (filed Sept. 16, 2003) 166

Complaint, *Kircher, et al. v. Putnam Funds Trust, et al.*, Cause No. 03-L-1255 (filed Sept. 16, 2003) 189

First Amended Complaint, *Parthasarathy, et al. v. T. Rowe Price International Funds, Inc., et al.*, Cause No. 03-L-1253 (filed Oct. 3, 2003) 213

Complaint, *Dudley, et al. v. Putnam International Equity Fund, et al.*, Cause No. 03-L-1539 (filed Nov. 10, 2003) 242

Complaint, *Dudley, et al. v. Putnam Investment Funds, et al.*, Cause No. 03-L-1540 (filed Nov. 10, 2003) 260

Complaint, *Vogeler v. Columbia Acorn Trust, et al.*, Cause No. 03-L-1550 (filed Nov. 13, 2003) 277

Complaint, *Jackson v. Van Kampen Series Fund, Inc., et al.*, Cause No. 03-L-2036 (filed Nov. 13, 2003) 294

Complaint, *Spurgeon v. Pacific Life Insurance Co.*, Cause No. 04-L-241 (filed Mar. 12, 2004) 311

Notices of Removal/Consents to Removal:

Notice of Removal, *Parthasarathy, et al. v. T. Rowe Price International Funds, Inc., et al.*, Civil No. 03-CV-673-DRH (filed Oct. 16, 2003) 331

Consent to Removal, *Parthasarathy, et al. v. T. Rowe Price International Funds, Inc., et al.*, Civil No. 03-CV-673-DRH (filed Oct. 23, 2003) 337

Notice of Removal, *Kircher, et al. v. Putnam Funds Trust, et al.*, Civil No. 03-CV-691-DRH (filed Oct. 23, 2003) 341

Notice of Removal, *Potter, et al. v. Janus Investment Fund, et al.*, Civil No. 03-CV-693-DRH (filed Oct. 23, 2003) 358

Janus Capital's Notice of Consent to and Joinder in Removal, *Potter, et al. v. Janus Investment Fund, et al.*, Civil No. 03-CV-693-DRH (filed Oct. 23, 2003) 367

Notice of Removal, *Vogeler v. Columbia Acorn Trust, et al.*, Civil No. 03-CV-843-DRH (filed Dec. 12, 2003) 369

Notice of Removal, *Dudley, et al. v. Putnam International Equity Fund, et al.*, Civil No. 03-CV-852-GPM (filed Dec. 15, 2003) 373

Notice of Removal, *Dudley, et al. v. Putnam Investment Funds, et al.*, Civil No. 03-CV-853-GPM (filed Dec. 15, 2003) 390

Notice of Removal, *Jackson v. Van Kampen Series Fund, Inc., et al.*, Civil No. 04-CV-56-DRH (filed Jan. 22, 2004) 407

Notice of Removal, *Spurgeon, etc. v. Pacific Life Insurance Co., et al.*, Civil No. 04-CV-355-MJR (filed May 21, 2004) 413

IN THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

Cause No. 03-L-1254

ROBERT POTTER AND DOROTHY LUETTINGER, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Plaintiffs,

v.

JANUS INVESTMENT FUND, A BUSINESS TRUST; JANUS CAPITAL MANAGEMENT, LLC; SCUDDER INTERNATIONAL FUND, INC., A CORPORATION; AND DEUTSCHE INVESTMENT MANAGEMENT AMERICAS, INC.,
Defendants.

[Filed Sept. 16, 2003]

COMPLAINT

COME NOW Plaintiffs, ROBERT POTTER and DOROTHY LUETTINGER, individually and on behalf of all others similarly situated, by and through their undersigned counsel, and for their complaint against Defendants, JANUS INVESTMENT FUND, JANUS CAPITAL MANAGEMENT, LLC, SCUDDER INTERNATIONAL FUND, INC., and DEUTSCHE INVESTMENT MANAGEMENT AMERICAS, INC., state as follows:

1. Plaintiff ROBERT POTTER is a resident of Edwardsville, Madison County, Illinois.

2. Plaintiff DOROTHY LUETTINGER is a resident of Trenton, Clinton County, Illinois.

3. Defendant JANUS INVESTMENT FUND ("JANUS FUNDS") is a Massachusetts business trust with its principal place of business in Denver, Colorado. JANUS FUNDS is

the sponsor of the Janus Overseas Fund ("Janus Overseas"). Defendant JANUS FUNDS does business in the state of Illinois and is registered as a mutual fund in the state of Illinois. Defendant JANUS FUNDS has consented to the jurisdiction of Illinois courts. Defendants JANUS FUNDS at all times relevant herein has promoted, marketed, and sold shares to the investing public nationwide including the state of Illinois. Defendant JANUS FUNDS maintains investor relationships nationwide including with shareholders in the state of Illinois. Defendant JANUS FUNDS has significant contacts with Madison County and the activities complained of herein occurred, in whole or part, in Madison County, Illinois.

4. Defendant JANUS CAPITAL MANAGEMENT, LLC ("JANUS FUNDS MANAGER") is a Delaware limited liability company with its principal place of business in Denver, Colorado. The day-to-day tasks associated with running the business of Janus Overseas Fund, such as investment management, share marketing, distribution, redemption, financial and regulatory reporting, and custodianship of funds are contracted out since it has no significant number of internal employees. Defendant JANUS FUNDS MANAGER has been contracted to serve as the investment manager for the Janus Overseas Fund. As the investment manager for Janus Overseas Fund, Defendant JANUS FUNDS MANAGER selects the fund's investments and operates or supervises most phases of the fund's business including the valuing of the fund's portfolio securities and the fund net asset value. Defendant JANUS FUNDS MANAGER has significant contacts with fund shareholders in Madison County as a result of its operation and supervision of Janus Overseas Fund business and the activities complained of herein occurred, in whole or in part, in Madison County, Illinois. Defendant JANUS FUNDS MANAGER utilizes an interactive website to communicate with fund shareholders, including those in Madison County, Illinois, regarding the performance of the Fund and the investments it manages.

5. Defendant SCUDDER INTERNATIONAL FUND, INC. ("SCUDDER FUNDS") is a Maryland corporation with its principal place of business in New York, New York. SCUDDER FUNDS is the sponsor of the Scudder International Fund ("Scudder International"). Defendant SCUDDER FUNDS does business in the state of Illinois and is registered as a mutual fund in the state of Illinois. Defendant SCUDDER FUNDS has consented to the jurisdiction of Illinois courts. Defendant SCUDDER FUNDS at all times relevant herein has promoted, marketed, and sold shares to the investing public nationwide including the state of Illinois. Defendant SCUDDER FUNDS maintains investor relationships nationwide including with shareholders in the state of Illinois. Defendant SCUDDER FUNDS has significant contacts with Madison County, and the activities complained of herein occurred, in whole or part, in Madison County, Illinois.

6. Defendant DEUTSCHE INVESTMENT MANAGEMENT AMERICAS, INC. ("SCUDDER FUND MANAGER") is a Delaware corporation with its principal place of business in New York, New York. The day-to-day tasks associated with running the business of Scudder International, such as investment management, share marketing, distribution, redemption, financial and regulatory reporting, and custodianship of funds, are contracted out since it has no significant number of internal employees. Defendant SCUDDER FUND MANAGER has been contracted to serve as the investment manager for Scudder International. As the investment manager for Scudder International, Defendant SCUDDER FUND MANAGER selects the fund's investments and operates or supervises most phases of the fund's business including the valuing of the fund's portfolio securities and the fund net asset value. Defendant SCUDDER FUND MANAGER has significant contacts with fund shareholders in Madison County as a result of its operation and supervision of Scudder International business and the activities complained of herein occurred, in whole or in part, in Madison County, Illinois. Defendant SCUDDER FUND MANAGER utilizes an interactive website to communicate

with fund shareholders, including those in Madison County, Illinois regarding the performance of the Fund and the investments it manages.

7. At all times relevant herein, Plaintiff ROBERT POTTER has owned and held shares of Janus Overseas for the purpose of long term investing in international securities.

8. At all times relevant herein, Plaintiff DOROTHY LUETTINGER has owned and held shares of Scudder International for the purpose of long term investing in international securities.

9. This Court has jurisdiction over the subject matter and the parties pursuant to 735 ILCS 5/2-209.

10. Venue is proper in this Court pursuant to 735 ILCS 5/2-101.

11. The foreign securities purchased by Defendants' Funds for their portfolios are principally traded in securities markets outside of the United States.

12. Open end mutual funds such as Defendants' Funds have been tremendously successful in convincing investors such as plaintiffs to hold their fund shares by urging investors to invest for the long term and by effectively marketing the various advantages of long term ownership of funds over direct investment including professional management, diversification, and liquidity.

13. Shares of open end mutual funds are sold to investors such as Plaintiffs at a price based upon the net asset value ("NAV") per share plus applicable sales charges. Investors in shares may redeem their shares at the NAV of the shares less any redemption charges.

14. The share prices (NAV) of Defendants' mutual funds are set by deducting the fund liabilities from the total assets of the portfolio and then dividing by the number of outstanding shares.

15. Because the sales and redemption prices are based upon NAV, which in turn depends upon the fluctuating value of the fund's underlying portfolio of securities, Defendants recalculate the fund net asset value every business day. Defendants set the fund share price (NAV) once every business day at the close ~~of trading~~ on the New York Stock Exchange at 4:00 p.m. Eastern Time. The NAV of the shares is reported by Defendants to the National Association of Securities Dealers (NASD) for public distribution.

16. In valuing its underlying assets for purposes of setting the NAV, Defendants use the last trade price in the home market of each of the securities in its portfolio. A significant portion of the securities in the Defendants' portfolios are foreign securities. The home markets for such foreign securities include London, Paris, Frankfurt, Moscow, Singapore, Kuala Lumpur, Hong Kong, Taipei, Tokyo and Sydney. These markets are located in time zones that are five hours to fifteen hours ahead of Eastern Standard Time.

17. Studies of world financial markets have established associations between the value changes among various markets. There is a positive correlation between value movements in the United States market and value movements in foreign markets. If the United States market experiences an upward movement in values, it can be predicted that Asian markets will move upward once trading begins their next day. The same upward movement can be predicted for European markets once trading begins their next day. Similarly, if the United States market experiences a downward movement in values, it can be predicted that Asian and European markets will move downward once trading begins their next day. Because of these positive correlations, the closing prices of the foreign securities in the underlying portfolio may not reflect current market values at the time Defendants set their fund NAV. Appropriate adjustments need to be made to the closing prices of the foreign securities in order to reflect current market

values. Despite knowledge of the United States market result, the positive correlations and the stale price of the foreign securities in its underlying portfolio, Defendants do not make any value adjustment to the portfolio's foreign securities prior to calculating fund NAV and setting share price every business day.

18. The positive correlation between the upward or downward movement of value in the United States market and subsequent movements in foreign markets around the world is between 0.7 and 0.8. A value of 0.0 equates to absolutely no correlation between value movements in United States markets and subsequent movements in foreign markets. A value of 1.0 equates to an absolute correlation between value movements in United States markets and subsequent value movements in foreign markets.

19. Studies of world financial markets demonstrate that the greater the percentage increase or decrease in the value of United States markets, the more likely foreign markets will post corresponding value movements on subsequent days. The probability that the value movements of foreign markets will follow the previous day's value movements in United States markets is directly correlated with the degree or extent of the value movement of United States markets.

20. Since many of the home markets for the foreign securities in the Defendants' asset portfolio last traded hours before the setting at 4:00 p.m. Eastern of the fund NAV, the closing prices used to calculate the NAV of Defendants' funds are stale and do not reflect price relevant information available subsequent to the foreign security's last trade that will affect the value of such security.

21. During the interval that elapses between the time that Defendants set their share NAV (and release it to the NASD for communication to the public) on consecutive days, the securities markets in Australia, Japan, Taiwan, Hong Kong, Malaysia, Singapore, Russia, Germany,

France and the United Kingdom have traded for an entire session from open to close.

22. The exchange located in Sydney, Australia observes normal market trading hours of 10:00 a.m. to 4:00 p.m. local time. Active trading of securities traded on this exchange ends, and closing prices for those securities are posted, at 4:00 p.m. local time (2:00 a.m. Eastern time). When Defendants calculate their fund NAV using closing prices from this exchange, Defendants rely upon closing prices for securities traded on this exchange that have been static for 14 hours.

23. The exchange located in Tokyo, Japan observes normal trading hours of 9:00 a.m. to 3:00 p.m. local time. Active trading of securities traded on this exchange ends, and closing prices for those securities are posted, at 3:00 p.m. local time (2:00 a.m. Eastern time). When Defendants calculate their fund NAV using closing prices from this exchange, Defendants rely upon closing prices for securities traded on this exchange that have been static for 14 hours.

24. The exchange located in Taipei, Taiwan observes normal trading hours of 9:00 a.m. to 1:30 p.m. local time. Active trading of securities traded on this exchange ends, and closing prices for those securities are posted, at 1:30 p.m. local time (1:30 a.m. Eastern time). When Defendants calculate their fund NAV using closing prices from this exchange, Defendants rely upon closing prices for securities traded on this exchange that have been static for 14.5 hours.

25. The exchange located in Hong Kong observes normal trading hours of 10:00 a.m. to 4:00 p.m. local time. Active trading of securities traded on this exchange ends, and closing prices for those securities are posted, at 4:00 p.m. local time (4:00 a.m. Eastern time). When Defendants calculate its fund NAV using closing prices from this exchange, Defendants rely upon closing prices for securi-

ties traded on this exchange that have been static for 12 hours.

26. The exchange located in Kuala Lumpur, Malaysia observes normal trading hours of 9:30 a.m. to 5:00 p.m. local time. Active trading of securities traded on this exchange ends, and closing prices for those securities are posted, at 5:00 p.m. local time (5:00 a.m. Eastern time). When Defendants calculate their fund NAV using closing prices from this exchange, Defendants rely upon closing prices for securities traded on this exchange that have been static for 11 hours.

27. The exchange located in Singapore observes normal trading hours of 9:00 a.m. to 5:00 p.m. local time. Active trading of securities traded on this exchange ends, and closing prices for those securities are posted, at 5:00 p.m. local time (5:00 a.m. Eastern time). When Defendants calculate their fund NAV using closing prices from this exchange, Defendants rely upon closing prices for securities traded on this exchange that have been static for 11 hours.

28. The exchange located in Moscow, Russia observes normal trading hours of 12:00 p.m. to 7:00 p.m. local time. Active trading of securities traded on this exchange ends, and closing prices for those securities are posted, at 7:00 p.m. local time (11:00 a.m. Eastern time). When Defendants calculate their fund NAV, using closing prices from this exchange, Defendants rely upon closing prices for securities traded on this exchange that have been static for 5 hours.

29. The exchange located in Frankfurt, Germany observes normal trading hours of 9:00 a.m. to 8:00 p.m. local time. Active trading of securities traded on this exchange ends, and closing prices for those securities are posted, at 8:00 p.m. local time (2:00 p.m. Eastern time). When Defendants calculate their fund NAV using closing prices from this exchange, Defendants rely upon closing prices for securities traded on this exchange that have been static for 2 hours.

30. The exchange located in Paris, France observes normal trading hours of 9:00 a.m. to 5:30 p.m. local time. Active trading of securities traded on this exchange ends, and closing prices for those securities are posted at, 5:30 p.m. local time (11:30 a.m. Eastern time). When Defendants calculate their fund NAV, using closing prices from this exchange Defendants rely upon closing prices for securities traded on this exchange that have been static for 4.5 hours.

31. The exchange located in London, England observes normal market hours of 8:00 a.m. to 4:30 p.m. local time. Active trading of securities traded on this exchange ends, and closing prices for those securities are posted at 4:30 p.m. local time (11:30 a.m. Eastern time). When Defendants calculate their fund NAV using closing prices from this exchange, Defendants rely upon closing prices for securities traded on this exchange that have been static for 4.5 hours.

32. A significant portion of the underlying foreign securities in the Defendants' portfolios are listed on foreign exchanges and trade during each market's respective session. The NAVs set by Defendants do not take into account on a daily basis any price relevant information that has become available in this two to fourteen and one/half hour interval, after the final prices for the underlying foreign securities have been posted but, prior to the setting of the NAVs. Such price relevant information impacts the valuation of these underlying foreign securities and is significant for valuation because the final market prices have become stale and do not reflect the current market value of the securities.

33. By failing to make daily adjustments based upon positive correlations between upward or downward movements in United States and foreign markets and by choosing to use stale prices in valuing their fund shares and setting their daily NAVs, Defendants have exposed long term shareholders to market timing traders who regularly purchase and redeem Defendants' shares as part of a profit-

able trading strategy. The market timing trading strategy stems from the ability of market timing traders to predict changes in the NAV. Market timing traders are able to predict changes in the NAV because of the positive correlations between value movements in United States markets and foreign markets. The stale price strategy of market timers who trade Defendants' shares is to buy shares on days when the United States market moves up and to sell (redeem) shares when the United States market moves down. In order to derive maximum benefit from price relevant information developed subsequent to the now stale closing prices of the portfolio securities, market timers wait until the fund deadline for buying or selling (redeeming) shares in Defendants' funds on any particular business day. Because Defendants cannot buy or sell the foreign securities in the funds' underlying portfolio (due to the time difference between New York and the home markets of the foreign securities) at the time it sets the daily NAV that values the shares it issues and redeems, the shares that Defendants issue to and redeem from market timers do not reflect current market prices of the foreign securities held by the fund.

34. Due to the use of stale prices by Defendants in valuing the fund shares, market timers who buy Defendants' funds' shares on days when the United States market moves up are buying discounted shares at the expense of other fund shareholders because the funds underlying foreign securities assets are undervalued as of the time of the share purchase.

35. Due to the use of stale prices by Defendants in valuing their fund shares, market timers who sell (redeem) Defendants' shares on days when the United States market moves down are selling (redeeming) shares at a premium at the expense of other fund shareholders because the underlying foreign securities assets are overvalued as of the time of the share sale (redemption).

36. Shares in Defendants' funds can be traded, either by purchase or redemption, only once a day at 4:00 p.m. Eastern Time.

37. The excess profits that are obtained by market timing traders' taking advantage of the stale pricing of Defendants' shares come at the expense of fellow shareholders who are non-trading long term buy and hold investors. The transfer of wealth from the non-trading long term buy and hold shareholders to the market timers trading Defendants shares in Defendants' funds occurs through dilution.

38. Market timing traders pay cash to Defendants funds when they purchase discounted shares. Market timing traders receive cash from Defendants funds when they sell (redeem) their shares at a premium. Defendants' fund NAV is diluted in both instances. When market timing traders are able to buy shares at a discount, Defendants' fund assets suffer dilution because the cash received by the fund for the shares purchased is less than the per share value of the underlying foreign securities because of the stale pricing utilized by Defendants. Likewise, when market timing traders are able to sell (redeem) shares at a premium, Defendants' fund assets suffer dilution because the cash paid out by the fund for the shares redeemed is more than the per share value of the underlying securities, again due to the stale pricing utilized by Defendants. In both instances, when Defendants receive less cash when issuing and pay out more cash when redeeming market timing trader shares than supported by the value of their underlying foreign securities, the result is a dilution of Defendants' cash. Since the cash held by the fund is one of the assets that is valued in setting the Defendants' daily fund NAV, it follows that the diluted fund cash position causes the fund NAV to be diluted as well. Due to the stale pricing utilized by Defendants, long term buy and hold shareholders have incurred a dilution in the NAV of their shares and the wealth represented by that diluted amount has been transferred to market timing traders.

39. By failing to make daily adjustments based upon positive correlations between upward movements in United States and foreign markets and by choosing to use stale prices in valuing the underlying foreign securities that are used setting their daily NAV, Defendants give market timing traders the opportunity to earn vastly higher returns at no additional risk. Unlike other market timing based trading, market timers who trade Defendants shares do not have to look into the future to time their purchases and redemptions of shares, rather, they have the luxury of being able to look backwards because Defendants' share pricing fails to adjust for recognized positive correlations and uses stale prices in valuing its underlying portfolio securities.

40. Since it is such an attractive low risk trading vehicle to market timers, Defendants' funds experience increased trading and transaction costs, disruption of planned investment strategies, forced and unplanned portfolio turnover including the liquidation of investments to meet market timer redemption requests, lost opportunity costs and asset swings that negatively impact fund operations and performance and the ability of the fund to provide a maximized return to long term shareholders.

41. Plaintiffs bring this complaint as a class action against Defendants JANUS FUNDS, JANUS FUNDS MANAGER, SCUDDER FUNDS and SCUDDER FUND MANAGER, and pursuant to § 5/2-801 et seq., of the Illinois Code of Civil Procedure individually and on behalf of a class of all persons in the United States who have owned shares in Janus Overseas or Scudder International for more than fourteen days from the date of purchase to the date of sale (redemption) or exchange ("long term shareholders"). The class period commences five years prior to the filing of this complaint. Excluded from the class are Defendants, any parent, subsidiary, affiliate, or controlled Person of Defendants, as well as the officers, directors, agents, servants or employees of Defendants, and the immediate family mem-

ber of any such person. Also excluded is any judge who may preside over this case.

42. Plaintiffs are members of the class and will fairly and adequately assert and protect the interests of the class. The interests of the Plaintiffs are coincident with, and not antagonistic to, those of other members of the class. Plaintiffs have retained attorneys who are experienced in class action litigation.

43. Members of the class are so numerous that joinder of all members is impracticable.

44. Common questions of law or fact predominate over any questions affecting only individual members of the Class. Common questions include, but are not limited to, the following:

i. whether defendants failed to properly evaluate on a daily basis whether a significant event affecting the value of Janus Overseas and Scudder International's portfolios of securities had occurred after the foreign home markets for such securities had closed but before the fund's NAV calculation and share price setting;

ii. whether defendants failed to properly implement Janus Overseas and Scudder International's portfolios valuation and share pricing policies and procedures making daily adjustments based upon United States market results and recognized positive correlations between upward movements in United States and foreign markets in the valuation of the fund's portfolio securities prior to the calculation of the fund NAV and setting of the share price;

iii. whether defendants failed to properly implement Janus Overseas and Scudder International's portfolio valuation and share pricing policies and procedures making daily adjustments to stale closing prices of the underlying portfolio securities before the fund's NAV calculation and share price setting;

iv. whether defendants failed to properly implement Janus Overseas and Scudder International's portfolio valuation and share pricing policies so as to require the use of fair value pricing on a daily basis to value portfolio securities and fund NAV and share prices when closing prices of portfolio securities did not reflect their market values;

v. whether defendants failed to protect Janus Overseas and Scudder International's long term shareholders from market timing traders of fund shares who use Janus Overseas and Scudder International's shares as a trading vehicle to earn profits at the expense of long term shareholders because of the failure of JANUS FUNDS, JANUS FUNDS MANAGER, SCUDDER FUNDS and SCUDDER FUND MANAGER to make daily adjustments, based upon known United States market results and recognized positive correlations between upward movements in United States and foreign markets, prior to the daily calculation of the fund NAV and the setting of share prices as well as their use of stale prices in the valuation of the fund's portfolio securities prior to the daily calculation of the fund NAV and the setting of share prices;

vi. whether defendants breached the duties they owed to plaintiffs and the class;

vii. whether plaintiffs and the class have been damaged and, if so,

viii. the extent of such damages.

45. The prosecution of separate actions by individual members of the Class would create a risk of:

i. inconsistent or varying adjudications with respect to individual members of the class; and

ii. adjudication with respect to individual members of the class, which would, as a practical matter, be dispositive of the interests of other members not

parties to the adjudication or substantially impair or impede their ability to protect their interest.

46. The class action method is appropriate for the fair and efficient prosecution of this action.

47. Individual litigation of all claims, which might be brought by all class members would produce a multiplicity of cases so that the judicial system would be congested for years. Class treatment, by contrast, provides manageable judicial treatment calculated to bring a rapid conclusion to all litigation of all claims arising from the conduct of the defendants.

48. The certification of a class would allow litigation of claims that, in view of the expense of the litigation, may be insufficient in amount to support separate actions.

Count I

COMES NOW Plaintiff, ROBERT POTTER, individually and on behalf of all others similarly situation [*sic*], by and through his undersigned counsel, and for Count I of his Complaint against Defendants JANUS FUNDS and JANUS FUNDS MANAGER, states as follows:

49. Plaintiff repeats and incorporates by reference paragraphs 1 through 48 as if fully set forth herein.

50. Defendant JANUS FUNDS operates Janus Overseas as an open end mutual fund with the stated goal of providing long term capital growth to investors who hold shares of the fund. The fund expressly states in its prospectus that it seeks to achieve its investment goal through a policy of investing in stocks and debt obligations of companies outside of the United States.

51. Defendant JANUS FUNDS MANAGER serves as the investment manager for Janus Overseas. Defendant JANUS FUNDS MANAGER provides, among other things, portfolio management services and selects the securities for Janus Overseas to buy, hold or sell. Janus Overseas pays Defendant JANUS FUNDS MANAGER set fees based on

the percentage of assets under management for managing Janus Overseas' assets. Defendant JANUS FUNDS MANAGER's compensation and management of the Janus Overseas Fund are required to be reviewed and approved by Defendant Janus Fund's board of trustees.

52. At all times relevant hereto, Plaintiff POTTER has owned shares in Janus Overseas.

53. In undertaking their role as investment managers with respect to the Funds, Defendants directly or impliedly held themselves out as skilled specialists in the field of investment management, possessing the knowledge, skill and care ordinarily used by reasonably well-qualified members of their profession.

54. It thereby became the duty of Defendants to exercise that degree of knowledge, skill and care ordinarily used by reasonably well-qualified members of their profession.

55. Defendants knew, or were negligent in not knowing, that the closing prices for the foreign securities represented in the Janus Overseas Fund and used by Defendants to calculate NAV for said Fund did not represent fair value because, inter alia, those prices did not reflect changes in trading prices as a result of trading which Defendants knew, or were negligent in not knowing, occurred daily after the closing of the New York Stock Exchange.

56. Defendants breached their duties of due care owed to Plaintiff Potter and similarly situated owners of the Janus Overseas Fund by, inter alia:

i. failing to properly evaluate on a daily basis whether a significant event affecting the value of Janus Overseas' portfolio of securities had occurred after the foreign trading markets for such securities had closed but before Defendants calculated NAV and share prices;

ii. failing to implement Janus Overseas' portfolio valuation and share pricing policies and procedures; and

iii. allowing portfolio valuation and share pricing policies and procedures which benefited market timing traders of Janus Overseas shares' at the expense of long term shareholders.

57. As a direct and proximate result of the Defendants' breach of their duties, Plaintiff Potter and the class have suffered damages in the amount to be proven at trial, but less than $75,000 per plaintiff or class member, including all compensatory damages, punitive damages, attorneys' fees and costs.

WHEREFORE, Plaintiffs and the Class pray that the Court enter judgment in their favor and against Defendants JANUS INVESTMENT FUND and JANUS CAPITAL MANAGEMENT LLC, as follows:

A. Ordering that this action be maintained as a class action pursuant to 735 ILCS 5/2 801 and the following class be certified:

> All persons in the United States who held shares in the Janus Overseas Fund or Scudder International Fund for a period of more than fourteen days before redeeming or exchanging them during the period beginning from five years prior to the date of the filing of this complaint;

B. Awarding Plaintiffs and the Class compensatory damages, prejudgment interest, costs of suits, punitive damages and attorneys' fees for an amount representing the damages caused by Defendants' breach of their duties not to exceed $75,000 per plaintiff or class member.

PLAINTIFFS DEMAND TRIAL BY JURY

Count II

COMES NOW Plaintiff, ROBERT POTTER, individually and on behalf of all others similarly situation [*sic*], by and through his undersigned counsel, and for Count II of his Complaint against Defendants JANUS FUNDS and JANUS FUNDS MANAGER, states as follows:

58. Plaintiff repeats and incorporates by reference paragraphs 1 through 48 and 50 through 55 as if fully set forth herein.

59. On or about January 1, 1965, applicable published regulations expressly recognized that changes in trading prices of securities in the Janus Overseas Fund might occur daily after the closing of the New York Stock Exchange.

60. With utter indifference and conscious disregard for Plaintiff POTTER'S investment and the investments of similarly situated fund owners, Defendants willfully and wantonly breached their duties to Plaintiff POTTER and similarly situated owners by, inter alia:

i. failing to know and implement applicable rules and regulations concerning the calculation of NAV;

ii. failing to properly evaluate on a daily basis whether a significant event affecting the value of Janus Overseas' portfolio of securities had occurred after the foreign trading markets for such securities had closed but before Defendants calculated NAV and share prices;

iii. failing to implement Janus Overseas' portfolio valuation and share pricing policies and procedures; and

iv. allowing portfolio valuation and share pricing policies and procedures which benefited market timing traders of Janus Overseas' shares at the expense of long term shareholders.

61. As a direct and proximate result of the Defendants' breach of their duties, Plaintiff Potter and the class have suffered damages in the amount to be proven at trial, but less than $75,000 per plaintiff or class member, including all compensatory damages, punitive damages, attorneys' fees and costs.

WHEREFORE, Plaintiffs and the Class pray that the Court enter judgment in their favor and against Defendants JANUS INVESTMENT FUND and JANUS CAPITAL MANAGEMENT LLC, as follows:

A. Ordering that this action be maintained as a class action pursuant to 735 ILCS 5/2 801 and the following class be certified:

> All persons in the United States who held shares in the Janus Overseas Fund or Scudder International Fund for a period of more than fourteen days before redeeming or exchanging them during the period beginning from five years prior to the date of the filing of this complaint;

B. Awarding Plaintiffs and the Class compensatory damages, prejudgment interest, costs of suits, punitive damages and attorneys' fees for an amount representing the damages caused by Defendants' breach of their duties not to exceed $75,000 per plaintiff or class member.

PLAINTIFFS DEMAND TRIAL BY JURY

Count III

COMES NOW Plaintiff, DOROTHY LUETTINGER, individually and on behalf of all others similarly situated, by and through her undersigned counsel, and for Count III of her Complaint against Defendants SCUDDER FUNDS and SCUDDER FUND MANAGER, states as follows:

62. Plaintiff repeats and incorporates by reference paragraphs 1 through 48 as if fully set forth herein.

63. Defendant SCUDDER FUNDS operates Scudder International Fund as an open end mutual fund with the stated goal of providing long term capital growth to investors who hold shares of the fund. The fund expressly states in its prospectus that it seeks to achieve its investment goal through a policy of investing in stocks and debt obligations of companies outside of the United States.

64. Defendant SCUDDER FUND MANAGER serves as the investment manager for Scudder International. Defendant SCUDDER FUND MANAGER provides, among other things, portfolio management services and selects the securities for Scudder International to buy, hold or sell. Scudder International pays Defendant SCUDDER FUND MANAGER set fees based on the percentage of assets under management for managing Scudder International's assets. Defendant SCUDDER FUND MANAGER's compensation and management of the Scudder International Fund are required to be reviewed and approved by Defendant SCUDDER FUNDS' board of trustees.

65. At all times relevant hereto, Plaintiff LUETTINGER has owned shares in Scudder International.

66. In undertaking their role as investment managers with respect to the Funds, Defendants directly or impliedly held themselves out as skilled specialists in the field of investment management, possessing the knowledge, skill and care ordinarily used by reasonably well-qualified members of their profession.

67. It thereby became the duty of Defendants to exercise that degree of knowledge, skill and care ordinarily used by reasonably well-qualified members of their profession.

68. Defendants knew, or were negligent in not knowing, that the closing prices for the foreign securities represented in the Scudder International Fund and used by Defendants to calculate NAV for said Fund did not represent fair value because, inter alia, those prices did not reflect changes in trading prices as a result of trading which De-

fendants knew, or were negligent in not knowing, occurred daily after the closing of the New York Stock Exchange.

69. Defendants breached their duties of due care owed to Plaintiff LUETTINGER and similarly situated owners of the Scudder International Fund by, inter alia:

i. failing to properly evaluate on a daily basis whether a significant event affecting the value of Scudder International's portfolio of securities had occurred after the foreign trading markets for such securities had closed but before Defendants calculated NAV and share prices;

ii. failing to implement Scudder International's portfolio valuation and share pricing policies and procedures; and

iii. allowing portfolio valuation and share pricing policies and procedures which benefited market timing traders of Scudder International's shares at the expense of long term shareholders.

70. As a direct and proximate result of the Defendants' breach of their duties, Plaintiff LUETTINGER and the class have suffered damages in the amount to be proven at trial, but less than $75,000 per plaintiff or class member, including all compensatory damages, punitive damages, attorneys' fees and costs.

WHEREFORE, Plaintiffs and the Class pray that the Court enter judgment in their favor and against Defendants SCUDDER INTERNATIONAL FUND, INC. and DEUTSCHE INVESTMENT MANAGEMENT AMERICAS, INC., as follows:

A. Ordering that this action be maintained as a class action pursuant to 735 ILCS 5/2 801 and the following class be certified:

> All persons in the United States who held shares in the Janus Overseas Fund or Scudder International Fund for a period of more than fourteen days before redeeming or exchanging them during the period

beginning from five years prior to the date of the filing of this complaint;

B. Awarding Plaintiffs and the Class compensatory damages, prejudgment interest, costs of suits, punitive damages and attorneys' fees for an amount representing the damages caused by Defendants' breach of their duties not to exceed $75,000 per plaintiff or class member.

PLAINTIFFS DEMAND TRIAL BY JURY

Count IV

COMES NOW Plaintiff, DOROTHY LUETTINGER, individually and on behalf of all others similarly situated, by and through her undersigned counsel, and for Count IV of her Complaint against Defendants SCUDDER FUNDS and SCUDDER FUND MANAGER, states as follows:

71. Plaintiff repeats and incorporates by reference paragraphs 1 through 48 and 63 through 68 as if fully set forth herein.

72. On or about January 1, 1965, applicable published regulations expressly recognized that changes in trading prices of securities in the Scudder International Fund might occur daily after the closing of the New York Stock Exchange.

73. With utter indifference and conscious disregard for Plaintiff's investment and the investments of similarly situated fund owners, Defendants willfully and wantonly breached their duties to Plaintiff LUETTINGER and similarly situated owners by, inter alia:

i. failing to know and implement applicable rules and regulations concerning the calculation of NAV;

ii. failing to properly evaluate on a daily basis whether a significant event affecting the value of Scudder International's portfolio of securities had occurred after the foreign trading markets for such

securities had closed but before Defendants calculated NAV and share prices;

iii. failing to implement Scudder International's portfolio valuation and share pricing policies and procedures; and

iv. allowing portfolio valuation and share pricing policies and procedures which benefitted market timing traders of Scudder International's shares at the expense of long term shareholders.

74. As a direct and proximate result of the Defendants' breach of their duties, Plaintiff LUETTINGER and the class have suffered damages in the amount to be proven at trial, but less than $75,000 per plaintiff or class member, including all compensatory damages, punitive damages, attorneys' fees and costs.

WHEREFORE, Plaintiffs and the Class pray that the Court enter judgment in their favor and against Defendants SCUDDER INTERNATIONAL FUND, INC. and DEUTSCHE INVESTMENT MANAGEMENT AMERICAS, INC., as follows:

A. Ordering that this action be maintained as a class action pursuant to 735 ILCS 5/2 801 and the following class be certified:

> All persons in the United States who held shares in the Janus Overseas Fund or Scudder International Fund for a period of more than fourteen days before redeeming or exchanging them during the period beginning from five years prior to the date of the filing of this complaint;

B. Awarding Plaintiffs and the Class compensatory damages, prejudgment interest, costs of suits, punitive damages and attorneys' fees for an amount representing the damages caused by Defendants' breach of their duties not to exceed $75,000 per plaintiff or class member.

PLAINTIFFS DEMAND TRIAL BY JURY

[attorney name and address blocks omitted]

IN THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

Cause No. 03-L-1255

CARL KIRCHER AND ROBERT BROCKWAY,
INDIVIDUALLY AND ON BEHALF OF ALL OTHERS
SIMILARLY SITUATED,
Plaintiffs,

v.

PUTNAM FUNDS TRUST, A BUSINESS TRUST,
PUTNAM INVESTMENT MANAGEMENT, LLC,
EVERGREEN INTERNATIONAL TRUST, A BUSINESS TRUST, AND
EVERGREEN INVESTMENT MANAGEMENT COMPANY, LLC,
Defendants.

[Filed Sept. 16, 2003]

COMPLAINT

COME NOW Plaintiffs, CARL KIRCHER and ROBERT BROCKWAY, individually and on behalf of all others similarly situated, by and through their undersigned counsel, and for their Complaint against Defendants, PUTNAM FUNDS TRUST, PUTNAM INVESTMENT MANAGEMENT, LLC, EVERGREEN INTERNATIONAL TRUST, and EVERGREEN INVESTMENT MANAGEMENT COMPANY, LLC, state as follows:

1. Plaintiff Carl Kircher, is a resident of Troy, Madison County, Illinois.

2. Plaintiff ROBERT BROCKWAY is a resident of Belleville, St. Clair County, Illinois.

3. Defendant PUTNAM FUNDS TRUST, ("PUTNAM FUNDS") is a Massachusetts business trust with its princi-

pal place of business in Boston, Massachusetts. PUTNAM FUNDS is the sponsor of the Putnam International Growth & Income Fund ("Putnam International Growth & Income"). Defendant PUTNAM FUNDS does business in the state of Illinois and is registered as a mutual fund in the state of Illinois. Defendant PUTNAM FUNDS has consented to the jurisdiction of Illinois courts. Defendant PUTNAM FUNDS at all times relevant herein has promoted, marketed, and sold shares to the investing public nationwide including the state of Illinois. Defendant PUTNAM FUNDS maintains investor relationships nationwide including with shareholders in the state of Illinois. Defendant PUTNAM FUNDS has significant contacts with Madison County, and the activities complained of herein occurred, in whole or part, in Madison County, Illinois.

4. Defendant PUTNAM INVESTMENT MANAGEMENT, LLC ("PUTNAM FUND MANAGER") is a Delaware limited liability company with its principal place of business in Boston, Massachusetts. The day-to-day tasks associated with running the business of Putnam International Growth & Income, such as investment management, share marketing, distribution, redemption, financial and regulatory reporting, and custodianship of funds, are contracted out since it has no significant number of internal employees. Defendant PUTNAM FUND MANAGER has been contracted to serve as the investment manager for the Putnam International Growth & Income. As the investment manager for Putnam International Growth & Income, Defendant PUTNAM FUND MANAGER selects the fund's investments and operates or supervises most phases of the fund's business including the valuing of the fund's portfolio securities and the fund net asset value. Defendant PUTNAM FUND MANAGER has significant contacts with fund shareholders in Madison County as a result of its operation and supervision of Putnam International Growth & Income business, and the activities complained of herein occurred, in whole or in part, in Madison County, Illinois. Defendant PUTNAM FUND MANAGER utilizes an interactive website to communicate with fund shareholders, including

those in Madison County, Illinois regarding the performance of the Fund and the investments it manages.

5. Defendant EVERGREEN INTERNATIONAL TRUST ("EVERGREEN FUNDS") is a Delaware business trust with its principal place of business in Boston, Massachusetts. EVERGREEN FUNDS is the sponsor of the Evergreen International Growth Fund ("Evergreen International"). Defendant EVERGREEN FUNDS does business in the state of Illinois and is registered as a mutual fund in the state of Illinois. Defendant EVERGREEN FUNDS has consented to the jurisdiction of Illinois courts. Defendant EVERGREEN FUNDS at all times relevant herein has promoted, marketed, and sold shares to the investing public nationwide including the state of Illinois. Defendant EVERGREEN FUNDS maintains investor relationships nationwide including with shareholders in the state of Illinois. Defendant EVERGREEN FUNDS has significant contacts with Madison County, and the activities complained of herein occurred, in whole or part, in Madison County, Illinois.

6. Defendant EVERGREEN INVESTMENT MANAGEMENT COMPANY, LLC ("EVERGREEN FUND MANAGER") is a Delaware limited liability company with its principal place of business in Boston, Massachusetts. The day-to-day tasks associated with running the business of Evergreen International, such as investment management, share marketing, distribution, redemption, financial and regulatory reporting, and custodianship of funds, are contracted out since it has no significant number of internal employees. Defendant EVERGREEN FUND MANAGER has been contracted to serve as the investment manager for the Evergreen International. As the investment manager for Evergreen International, Defendant EVERGREEN FUND MANAGER selects the fund's investments and operates or supervises most phases of the fund's business including the valuing of the fund's portfolio securities and the fund net asset value. Defendant EVERGREEN FUND MANAGER has significant contacts with fund shareholders in Madison County as a result of its operation and supervision of

Evergreen International business and the activities complained of herein occurred, in whole or in part, in Madison County, Illinois. Defendant EVERGREEN FUND MANAGER utilizes an interactive website to communicate with fund shareholders, including those in Madison, Illinois, regarding the performance of the Fund and the investments it manages.

7. At all times relevant herein, Plaintiff CARL KIRCHER has owned and held shares of Putnam International Growth & Income Fund for the purpose of long term investing in international securities.

8. At all times relevant herein, Plaintiff ROBERT BROCKWAY has owned and held shares of Evergreen International in his Individual Retirement Account for the purpose of long term investing in international securities.

9. This Court has jurisdiction over the subject matter and the parties pursuant to 735 ILCS 5/2-209.

10. Venue is proper in this Court pursuant to 735 ILCS 5/2-101.

11. The foreign securities purchased by Defendants' Funds for their portfolios are principally traded in securities markets outside of the United States.

12. Open end mutual funds such as Defendants' Funds have been tremendously successful in convincing investors such as plaintiffs to hold their fund shares by urging investors to invest for the long term and by effectively marketing the various advantages of long term ownership of funds over direct investment including professional management, diversification, and liquidity.

13. Shares of open end mutual funds are sold to investors such as Plaintiffs at a price based upon the net asset value ("NAV") per share plus applicable sales charges. Investors in shares may redeem their shares at the NAV of the shares less any redemption charges.

14. The share prices (NAV) of Defendants' mutual funds are set by deducting the fund liabilities from the total assets of the portfolio and then dividing by the number of outstanding shares.

15. Because the sales and redemption prices are based upon NAV, which in turn depends upon the fluctuating value of the fund's underlying portfolio of securities, Defendants recalculate the fund net asset value every business day. Defendants set the fund share price (NAV) once every business day at the close of trading on the New York Stock Exchange at 4:00 p.m. Eastem Time. The NAV of the shares is reported by Defendants to the National Association of Securities Dealers (NASD) for public distribution.

16. In valuing its underlying assets for purposes of setting the NAV, Defendants use the last trade price in the home market of each of the securities in its portfolio. A significant portion of the securities in the Defendants' portfolios are foreign securities. The home markets for such foreign securities include London, Paris, Frankfurt, Moscow, Singapore, Kuala Lumpur, Hong Kong, Taipei, Tokyo and Sydney. These markets are located in time zones that are five hours to fifteen hours ahead of Eastern Standard Time.

17. Studies of world financial markets have established associations between the value changes among various markets. There is a positive correlation between value movements in the United States market and value movements in foreign markets. If the United States market experiences an upward movement in values, it can be predicted that Asian markets will move upward once trading begins their next day. The same upward movement can be predicted for European markets once trading begins their next day. Similarly, if the United States market experiences a downward movement in values, it can be predicted that Asian and European markets will move downward once trading begins their next day. Because of these positive correlations, the closing prices of the foreign securities

in the underlying portfolio may not reflect current market values at the time Defendants set their fund NAV. Appropriate adjustments need to be made to the closing prices of the foreign securities in order to reflect current market values. Despite knowledge of the United States market result, the positive correlations and the stale price of the foreign securities in its underlying portfolio, Defendants do not make any value adjustment to the portfolio's foreign securities prior to calculating fund NAV and setting share price every business day.

18. The positive correlation between the upward or downward movement of value in the United States market and subsequent movements in foreign markets around the world is between 0.7 and 0.8. A value of 0.0 equates to absolutely no correlation between value movements in United States markets and subsequent movements in foreign markets. A value of 1.0 equates to an absolute correlation between value movements in United States markets and subsequent value movements in foreign markets.

19. Studies of world financial markets demonstrate that the greater the percentage increase or decrease in the value of United States markets, the more likely foreign markets will post corresponding value movements on subsequent days. The probability that the value movements of foreign markets will follow the previous day's value movements in United States markets is directly correlated with the degree or extent of the value movement of United States markets.

20. Since many of the home markets for the foreign securities in the Defendants' asset portfolio last traded hours before the setting at 4:00 p.m. Eastern of the fund NAV, the closing prices used to calculate the NAV of Defendants' funds are stale and do not reflect price relevant information available subsequent to the foreign security's last trade that will affect the value of such security.

21. During the interval that elapses between the time that Defendants set their share NAV (and release it to the

NASD for communication to the public) on consecutive days, the securities markets in Australia, Japan, Taiwan, Hong Kong, Malaysia, Singapore, Russia, Germany, France and the United Kingdom have traded for an entire session from open to close.

22. The exchange located in Sydney, Australia observes normal ~~market trading~~ hours of 10:00 a.m. to 4:00 p.m. local time. Active trading of securities traded on this exchange ends, and closing prices for those securities are posted, at 4:00 p.m. local time (2:00 a.m. Eastern time). When Defendants calculate their fund NAV using closing prices from this exchange, Defendants rely upon closing prices for securities traded on this exchange that have been static for 14 hours.

23. The exchange located in Tokyo, Japan observes normal trading hours of 9:00 a.m. to 3:00 p.m. local time. Active trading of securities traded on this exchange ends, and closing prices for those securities are posted, at 3:00 p.m. local time (2:00 a.m. Eastern time). When Defendants calculate their fund NAV using closing prices from this exchange, Defendants rely upon closing prices for securities traded on this exchange that have been static for 14 hours.

24. The exchange located in Taipei, Taiwan observes normal trading hours of 9:00 a.m. to 1:30 p.m. local time. Active trading of securities traded on this exchange ends, and closing prices for those securities are posted, at 1:30 p.m. local time (1:30 a.m. Eastern time). When Defendants calculate their fund NAV using closing prices from this exchange, Defendants rely upon closing prices for securities traded on this exchange that have been static for 14.5 hours.

25. The exchange located in Hong Kong observes normal trading hours of 10:00 a.m. to 4:00 p.m. local time. Active trading of securities traded on this exchange ends, and closing prices for those securities are posted, at 4:00 p.m. local time (4:00 a.m. Eastern time). When Defen-

dants calculate its fund NAV using closing prices from this exchange, Defendants rely upon closing prices for securities traded on this exchange that have been static for 12 hours.

26. The exchange located in Kuala Lumpur, Malaysia observes normal trading hours of 9:30 a.m. to 5:00 p.m. local time. Active trading of securities traded on this exchange ends, and closing prices for those securities are posted, at 5:00 p.m. local time (5:00 a.m. Eastern time). When Defendants calculate their fund NAV using closing prices from this exchange, Defendants rely upon closing prices for securities traded on this exchange that have been static for 11 hours.

27. The exchange located in Singapore observes normal trading hours of 9:00 a.m. to 5:00 p.m. local time. Active trading of securities traded on this exchange ends, and closing prices for those securities are posted, at 5:00 p.m. local time (5:00 a.m. Eastern time). When Defendants calculate their fund NAV using closing prices from this exchange, Defendants rely upon closing prices for securities traded on this exchange that have been static for 11 hours.

28. The exchange located in Moscow, Russia observes normal trading hours of 12:00 p.m. to 7:00 p.m. local time. Active trading of securities traded on this exchange ends, and closing prices for those securities are posted, at 7:00 p.m. local time (11:00 a.m. Eastern time). When Defendants calculate their fund NAV, using closing prices from this exchange, Defendants rely upon closing prices for securities traded on this exchange that have been static for 5 hours.

29. The exchange located in Frankfurt, Germany observes normal trading hours of 9:00 a.m. to 8:00 p.m. local time. Active trading of securities traded on this exchange ends, and closing prices for those securities are posted, at 8:00 p.m. local time (2:00 p.m. Eastern time). When Defendants calculate their fund NAV using closing prices from this exchange, Defendants rely upon closing prices

for securities traded on this exchange that have been static for 2 hours.

30. The exchange located in Paris, France observes normal trading hours of 9:00 a.m. to 5:30 p.m. local time. Active trading of securities traded on this exchange ends, and closing prices for those securities are posted at, 5:30 p.m. local time (11:30 a.m. Eastern time). When Defendants calculate their fund NAV, using closing prices from this exchange Defendants rely upon closing prices for securities traded on this exchange that have been static for 4.5 hours.

31. The exchange located in London, England observes normal market hours of 8:00 a.m. to 4:30 p.m. local time. Active trading of securities traded on this exchange ends, and closing prices for those securities are posted at 4:30 p.m. local time (11:30 a.m. Eastern time). When Defendants calculate their fund NAV using closing prices from this exchange, Defendants rely upon closing prices for securities traded on this exchange that have been static for 4.5 hours.

32. A significant portion of the underlying foreign securities in the Defendants' portfolios are listed on foreign exchanges and trade during each market's respective session. The NAVs set by Defendants do not take into account on a daily basis any price relevant information that has become available in this two to fourteen and one/half hour interval, after the final prices for the underlying foreign securities have been posted but, prior to the setting of the NAVs. Such price relevant information impacts the valuation of these underlying foreign securities and is significant for valuation because the final market prices have become stale and do not reflect the current market value of the securities.

33. By failing to make daily adjustments based upon positive correlations between upward or downward movements in United States and foreign markets and by choosing to use stale prices in valuing their fund shares and set-

ting their daily NAVs. Defendants have exposed long term shareholders to market timing traders who regularly purchase and redeem Defendants' shares as part of a profitable trading strategy. The market timing trading strategy stems from the ability of market timing traders to predict changes in the NAV. Market timing traders are able to predict changes in the NAV because of the positive correlations between value movements in United States markets and foreign markets. The stale price strategy of market timers who trade Defendants' shares is to buy shares on days when the United States market moves up and to sell (redeem) shares when the United States market moves down. In order to derive maximum benefit from price relevant information developed subsequent to the now stale closing prices of the portfolio securities, market timers wait until the fund deadline for buying or selling (redeeming) shares in Defendants' funds on any particular business day. Because Defendants cannot buy or sell the foreign securities in the funds' underlying portfolio (due to the time difference between New York and the home markets of the foreign securities) at the time it sets the daily NAV that values the shares it issues and redeems, the shares that Defendants issue to and redeem from market timers do not reflect current market prices of the foreign securities held by the fund.

34. Due to the use of stale prices by Defendants in valuing the fund shares, market timers who buy Defendants' funds' shares on days when the United States market moves up are buying discounted shares at the expense of other fund shareholders because the funds underlying foreign securities assets are undervalued as of the time of the share purchase.

35. Due to the use of stale prices by Defendants in valuing their fund shares, market timers who sell (redeem) Defendants' shares on days when the United States market moves down are selling (redeeming) shares at a premium at the expense of other fund shareholders be-

cause the underlying foreign securities assets are overvalued as of the time of the share sale (redemption).

36. Shares in Defendants' funds can be traded, either by purchase or redemption, only once a day at 4:00 p.m. Eastern Time.

37. The excess profits that are obtained by market timing traders' taking advantage of the stale pricing of Defendants' shares come at the expense of fellow shareholders who are non-trading long term buy and hold investors. The transfer of wealth from the non-trading long term buy and hold shareholders to the market timers trading Defendants shares in Defendants' funds occurs through dilution.

38. Market timing traders pay cash to Defendants funds when they purchase discounted shares. Market timing traders receive cash from Defendants funds when they sell (redeem) their shares at a premium. Defendants' fund NAV is diluted in both instances. When market timing traders are able to buy shares at a discount, Defendants' fund assets suffer dilution because the cash received by the fund for the shares purchased is less than the per share value of the underlying foreign securities because of the stale pricing utilized by Defendants. Likewise, when market timing traders are able to sell (redeem) shares at a premium, Defendants' fund assets suffer dilution because the cash paid out by the fund for the shares redeemed is more than the per share value of the underlying securities, again due to the stale pricing utilized by Defendants. In both instances, when Defendants receive less cash when issuing and pay out more cash when redeeming market timing trader shares than supported by the value of their underlying foreign securities, the result is a dilution of Defendants' cash. Since the cash held by the fund is one of the assets that is valued in setting the Defendants' daily fund NAV, it follows that the diluted fund cash position causes the fund NAV to be diluted as well. Due to the stale pricing utilized by Defendants, long term buy and hold shareholders have incurred a dilution in the NAV of

their shares and the wealth represented by that diluted amount has been transferred to market timing traders.

39. By failing to make daily adjustments based upon positive correlations between upward movements in United States and foreign markets and by choosing to use stale prices in valuing the underlying foreign securities that are used setting their daily NAV, Defendants give market timing traders the opportunity to earn vastly higher returns at no additional risk. Unlike other market timing based trading, market timers who trade Defendants shares do not have to look into the future to time their purchases and redemptions of shares, rather, they have the luxury of being able to look backwards because Defendants' share pricing fails to adjust for recognized positive correlations and uses stale prices in valuing its underlying portfolio securities.

40. Since it is such an attractive low risk trading vehicle to market timers, Defendants' funds experience increased trading and transaction costs, disruption of planned investment strategies, forced and unplanned portfolio turnover including the liquidation of investments to meet market timer redemption requests, lost opportunity costs and asset swings that negatively impact fund operations and performance and the ability of the fund to provide a maximized return to long term shareholders.

41. Plaintiffs bring this complaint as a class action against Defendants PUTNAM FUNDS, PUTNAM FUND MANAGER, EVERGREEN FUNDS, EVERGREEN FUND MANAGER, and pursuant to § 5/2-801 et seq., of the Illinois Code of Civil Procedure individually and on behalf of a class of all persons in the United States who have owned shares in Putnam International Growth & Income or Evergreen International Growth for more than fourteen days from the date of purchase to the date of sale (redemption) or exchange ("long term shareholders"). The class period commences five years prior to the filing of this complaint through the date of filing. Excluded from the class are Defendants, any parent, subsidiary, affiliate, or controlled

person of Defendants, as well as the officers, directors, agents, servants or employees of Defendants, and the immediate family member of any such person. Also excluded is any judge who may preside over this case.

42. Plaintiffs are members of the class and will fairly and adequately assert and protect the interests of the class. The interests of the Plaintiffs are coincident with, and not antagonistic to, those of other members of the class. Plaintiffs have retained attorneys who are experienced in class action litigation.

43. Members of the class are so numerous that joinder of all members is impracticable.

44. Common questions of law or fact predominate over any questions affecting only individual members of the Class. Common questions include, but are not limited to, the following:

i. whether defendants failed to properly evaluate on a daily basis whether a significant event affecting the value of Putnam International Growth & Income and Evergreen International Growth's portfolios of securities had occurred after the foreign home markets for such securities had closed but before the fund's NAV calculation and share price setting;

ii. whether defendants failed to properly implement Putnam International Growth & Income and Evergreen International Growth's portfolios valuation and share pricing policies and procedures making daily adjustments based upon United States market results and recognized positive correlations between upward movements in United States and foreign markets in the valuation of the fund's portfolio securities prior to the calculation of the fund NAV and setting of the share price;

iii. whether defendants failed to properly implement Putnam International Growth & Income and Evergreen International Growth's portfolio valuation

and share pricing policies and procedures making daily adjustments to stale closing prices of the underlying portfolio securities before the fund's NAV calculation and share price setting;

iv. whether defendants failed to properly implement Putnam International Growth & Income and Evergreen International Growth's portfolio valuation and share pricing policies so as to require the use of fair value pricing on a daily basis to value portfolio securities and fund NAV and share prices when closing prices of portfolio securities did not reflect their market values;

v. whether defendants failed to protect Putnam International Growth & Income and Evergreen International Growth's long term shareholders from market timing traders of fired shares who use Putnam International Growth & Income and Evergreen International Growth shares as a trading vehicle to earn profits at the expense of long term shareholders because of the failure of PUTNAM FUNDS, PUTNAM FUND MANAGER, EVERGREEN FUNDS AND EVERGREEN FUND MANAGER to make daily adjustments, based upon known United States market results and recognized positive correlations between upward movements in United States and foreign markets, prior to the daily calculation of the fund NAV and the setting of share prices as well as their use of stale prices in the valuation of the fund's portfolio securities prior to the daily calculation of the fund NAV and the setting of share prices;

vi. whether defendants breached the duties they owed to plaintiffs and the class;

vii. whether plaintiffs and the class have been damaged and, if so,

viii. the extent of such damages.

45. The prosecution of separate actions by individual members of the Class would create a risk of:

i. inconsistent or varying adjudications with respect to individual members of the class; and

ii. adjudication with respect to individual members of the class, which would, as a practical matter, be dispositive of the interests of other members not parties to the adjudication or substantially impair or impede their ability to protect their interest.

46. The class action method is appropriate for the fair and efficient prosecution of this action.

47. Individual litigation of all claims, which might be brought by all class members would produce a multiplicity of cases so that the judicial system would be congested for years. Class treatment, by contrast, provides manageable judicial treatment calculated to bring a rapid conclusion to all litigation of all claims arising from the conduct of the defendants.

48. The certification of a class would allow litigation of claims that, in view of the expense of the litigation, may be insufficient in amount to support separate actions.

Count I

COMES NOW Plaintiff CARL KIRCHER, individually and on behalf of all others similarly situated, by and through his undersigned counsel, and for Count I of his Complaint against Defendants PUTNAM FUNDS TRUST and PUTNAM INVESTMENT MANAGEMENT, LLC, states as follows:

49. Plaintiff repeats and incorporates by reference paragraphs 1 through 48 as if fully set forth herein.

50. Defendant PUTNAM FUNDS operates Putnam International Growth & Income as an open end mutual fund with the stated goal of providing long term capital growth to investors who hold shares of the fund. The fund expressly states in its prospectus that it seeks to achieve its

investment goal through a policy of investing in stocks and debt obligations of companies outside of the United States.

51. Defendant PUTNAM FUND MANAGER serves as the investment manager for Putnam International Growth & Income. Defendant PUTNAM FUND MANAGER provides, among other things, portfolio management services and selects the securities for Putnam International Growth & Income to buy, hold or sell. Putnam International Growth & Income pays Defendant PUTNAM FUND MANAGER set fees based on the percentage of assets under management for managing Putnam International Growth & Income's assets. Defendant PUTNAM FUND MANAGER's compensation and management of the Putnam International Growth & Income Fund are required to be reviewed and approved by Defendant Putnam Fund's board of trustees.

52. At all times relevant hereto, Plaintiff Kircher has owned shares in Putnam International Growth & Income.

53. In undertaking their role as investment managers with respect to the Funds, Defendants directly or impliedly held themselves out as skilled specialists in the field of investment management, possessing the knowledge, skill and care ordinarily used by reasonably well-qualified members of their profession.

54. It thereby became the duty of Defendants to exercise that degree of knowledge, skill and care ordinarily used by reasonably well-qualified members of their profession.

55. Defendants knew, or were negligent in not knowing, that the closing prices for the foreign securities represented in the Putnam International Growth & Income Fund and used by Defendants to calculate NAV for said Fund did not represent fair value because, inter alia, those prices did not reflect changes in trading prices as a result of trading which Defendants knew, or were negligent in not knowing, occurred daily after the closing of the New York Stock Exchange.

56. Defendants breached their duties of due care owed to Plaintiff KIRCHER and similarly situated owners of the Putnam International Growth & Income Fund by, inter alia:

i. failing to properly evaluate on a daily basis whether a significant event affecting the value of Putnam International Growth & Income's portfolio of securities had occurred after the foreign trading markets for such securities had closed but before Defendants calculated NAV and share prices;

ii. failing to implement Putnam International Growth & Income's portfolio valuation and share pricing policies and procedures; and

iii. allowing portfolio valuation and share pricing policies and procedures which benefited market timing traders of Putnam International Growth & Income's shares at the expense of long term shareholders.

57. As a direct and proximate result of the Defendants' breach of their duties, Plaintiff KIRCHER and the class have suffered damages in the amount to be proven at trial, but less than $75,000 per plaintiff or class member, including all compensatory damages, punitive damages, attorneys' fees and costs.

WHEREFORE, Plaintiffs and the Class pray that the Court enter judgment in their favor and against Defendants PUTNAM FUNDS TRUST and PUTNAM INVESTMENT MANAGEMENT, LLC, as follows:

A. Ordering that this action be maintained as a class action pursuant to 735 ILCS 5/2 801 and the following class be certified:

> All persons in the United States who held shares in the Putnam International Growth & Income Fund or Evergreen International Growth Fund for a period of more than fourteen days before redeeming or exchanging them during the period beginning from

five years prior to and through the date of the filing of this complaint;

B. Awarding Plaintiffs and the Class compensatory damages, prejudgment interest, costs of suits, punitive damages and attorneys' fees for an amount representing the damages caused by Defendants' breach of their duties not to exceed $75,000 per plaintiff or class member.

PLAINTIFF DEMANDS TRIAL BY JURY

Count II

COMES NOW Plaintiff CARL KIRCHER, individually and on behalf of all others similarly situated, by and through his undersigned counsel, and for Count II of his Complaint against Defendants PUTNAM FUNDS TRUST and PUTNAM INVESTMENT MANAGEMENT, LLC, states as follows:

58. Plaintiff repeats and incorporates by reference paragraphs 1 through 48 and 50 through 55 as if fully set forth herein.

59. On or about January 1, 1965, applicable published regulations expressly recognized that changes in trading prices of securities in the Putnam International Growth & Income Fund might occur daily after the closing of the New York Stock Exchange.

60. With utter indifference and conscious disregard for Plaintiff KIRCHER'S investment and the investments of similarly situated fund owners, Defendants willfully and wantonly breached their duties to Plaintiff KIRCHER and similarly situated owners by, inter alia:

i. failing to know and implement applicable rules and regulations concerning the calculation of NAV;

ii. failing to properly evaluate on a daily basis whether a significant event affecting the value of Putnam International Growth & Income's portfolio of securities had occurred after the foreign trading

markets for such securities had closed but before Defendants calculated NAV and share prices;

iii. failing to implement Putnam International Growth & Income's portfolio valuation and share pricing policies and procedures; and

iv. allowing portfolio valuation and share pricing policies and procedures which benefited market timing traders of Putnam International Growth & Income's shares at the expense of long term shareholders.

61. As a direct and proximate result of the Defendants' breach of their duties, Plaintiff KIRCHER and the class have suffered damages in the amount to be proven at trial, but less than $75,000 per plaintiff or class member, including all compensatory damages, punitive damages, attorneys' fees and costs.

WHEREFORE, Plaintiffs and the Class pray that the Court enter judgment in their favor and against Defendants PUTNAM FUNDS TRUST and PUTNAM INVESTMENT MANAGEMENT, LLC, as follows:

A. Ordering that this action be maintained as a class action pursuant to 735 ILCS 5/2 801 and the following class be certified:

> All persons in the United States who held shares in the Putnam International Growth & Income Fund or Evergreen International Growth Fund for a period of more than fourteen days before redeeming or exchanging them during the period beginning from five years prior to and through the date of the filing of this complaint;

B. Awarding Plaintiffs and the Class compensatory damages, prejudgment interest, costs of suits, punitive damages and attorneys' fees for an amount representing the damages caused by Defendants' breach of their duties not to exceed $75,000 per plaintiff or class member.

PLAINTIFFS DEMAND TRIAL BY JURY

Count III

COMES NOW Plaintiff ROBERT BROCKWAY, individually and on behalf of all others similarly situated, and for Count III of his Complaint against Defendants EVERGREEN FUNDS and EVERGREEN FUND MANAGER, states as follows:

62. Plaintiff repeats and incorporates by reference paragraphs 1 through 48 as if fully set forth herein.

63. Defendant EVERGREEN FUNDS operates Evergreen International Fund as an open end mutual fund with the stated goal of providing long term capital growth to investors who hold shares of the fund. The fund expressly states in its prospectus that it seeks to achieve its investment goal through a policy of investing in stocks and debt obligations of companies outside of the United States.

64. Defendant EVERGREEN FUND MANAGER serves as the investment manager for Evergreen International. Defendant EVERGREEN FUND MANAGER provides, among other things, portfolio management services and selects the securities for Evergreen International to buy, hold or sell. Evergreen International pays Defendant EVERGREEN FUND MANAGER set fees based on the percentage of assets under management for managing Evergreen International's assets. Defendant EVERGREEN FUND MANAGER's compensation and management of the Evergreen International Fund are required to be reviewed and approved by Defendant EVERGREEN FUNDS' board of trustees.

65. At all times relevant hereto, Plaintiff BROCKWAY has owned shares in Evergreen International.

66. In undertaking their role as investment managers with respect to the Funds, Defendants directly or impliedly held themselves out as skilled specialists in the field of investment management, possessing the knowledge, skill and care ordinarily used by reasonably well-qualified members of their profession.

67. It thereby became the duty of Defendants to exercise that degree of knowledge, skill and care ordinarily used by reasonably well-qualified members of their profession.

68. Defendants knew, or were negligent in not knowing, that the closing prices for the foreign securities represented in the Evergreen International Fund and used by Defendants to calculate NAV for said Fund did not represent fair value because, inter alia, those prices did not reflect changes in trading prices as a result of trading which Defendants knew, or were negligent in not knowing, occurred daily after the closing of the New York Stock Exchange.

69. Defendants breached their duties of due care owed to Plaintiff BROCKWAY and similarly situated owners of the Evergreen International Fund by, inter alia:

i. failing to properly evaluate on a daily basis whether a significant event affecting the value of Evergreen International's portfolio of securities had occurred after the foreign trading markets for such securities had closed but before Defendants calculated NAV and share prices;

ii. failing to implement Evergreen International's portfolio valuation and share pricing policies and procedures; and

iii. allowing portfolio valuation and share pricing policies and procedures which benefitted market timing traders of Evergreen International's shares at the expense of long term shareholders.

70. As a direct and proximate result of the Defendants' breach of their duties, Plaintiff BROCKWAY and the class have suffered damages in the amount to be proven at trial, but less than $75,000 per plaintiff or class member, including all compensatory damages, punitive damages, attorneys' fees and costs.

WHEREFORE, Plaintiffs and the Class pray that the Court enter judgment in their favor and against Defendants EVERGREEN INTERNATIONAL TRUST and EVERGREEN INVESTMENT MANAGEMENT COMPANY, LLC, as follows:

A. Ordering that this action be maintained as a class action pursuant to 735 ILCS 5/2 801 and the following class be certified:

> All persons in the United States who held shares in the Putnam International Growth & Income Fund or Evergreen International Growth Fund for a period of more than fourteen days before redeeming or exchanging them during the period beginning from five years prior to and through the date of the filing of this complaint;

B. Awarding Plaintiffs and the Class compensatory damages, prejudgment interest, costs of suits, punitive damages and attorneys' fees for an amount representing the damages caused by Defendants' breach of their duties not to exceed $75,000 per plaintiff or class member.

PLAINTIFFS DEMAND TRIAL BY JURY

Count IV

COMES NOW Plaintiff ROBERT BROCKWAY, individually and on behalf of all others similarly situated, and for Count IV of his Complaint against Defendants EVERGREEN FUNDS and EVERGREEN FUND MANAGER, states as follows:

71. Plaintiff repeats and incorporates by reference paragraphs 1 through 48 and 63 through 68 as if fully set forth herein.

72. On or about January 1, 1965, applicable published regulations expressly recognized that changes in trading prices of securities in the Evergreen International Fund might occur daily after the closing of the New York Stock Exchange.

73. With utter indifference and conscious disregard for Plaintiff BROCKWAY's investment and the investments of similarly situated fund owners, Defendants willfully and wantonly breached their duties to Plaintiff BROCKWAY and similarly situated owners by, inter alia:

i. failing to know and implement applicable rules and regulations concerning the calculation of NAV;

ii. failing to properly evaluate on a daily basis whether a significant event affecting the value of Evergreen International's portfolio of securities had occurred after the foreign trading markets for such securities had closed but before Defendants calculated NAV and share prices;

iii. failing to implement Evergreen International's portfolio valuation and share pricing policies and procedures; and

iv. allowing portfolio valuation and share pricing policies and procedures which benefited market timing traders of Evergreen International's shares at the expense of long term shareholders.

74. As a direct and proximate result of the Defendants' breach of their duties, Plaintiff Brockway and the class have suffered damages in the amount to be proven at trial, but less than $75,000 per plaintiff or class member, including all compensatory damages, punitive damages, attorneys' fees and costs.

WHEREFORE, Plaintiffs and the Class pray that the Court enter judgment in their favor and against Defendants EVERGREEN INTERNATIONAL TRUST and EVERGREEN INVESTMENT MANAGEMENT COMPANY, LLC, as follows:

A. Ordering that this action be maintained as a class action pursuant to 735 ILCS 5/2 801 and the following class be certified:

All persons in the United States who held shares in the Putnam International Growth & Income Fund

or Evergreen International Growth Fund for a period of more than fourteen days before redeeming or exchanging them during the period beginning from five years prior to and through the date of the filing of this complaint;

B. Awarding Plaintiffs and the Class compensatory damages, prejudgment interest, costs of suits, punitive damages and attorneys' fees for an amount representing the damages caused by Defendants' breach of their duties not to exceed $75,000 per plaintiff or class member.

[attorney name and address blocks omitted]

IN THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

Cause No. 03-L-1253

T.K. PARTHASARATHY, EDMUND WOODBURY, STUART ALLEN SMITH, AND SHARON SMITH, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Plaintiffs,

v.

T. ROWE PRICE INTERNATIONAL FUNDS, INC., A CORPORATION, T. ROWE PRICE INTERNATIONAL, INC., ARTISAN FUNDS, INC., A CORPORATION, ARTISAN PARTNERS LIMITED PARTNERSHIP, AIM INTERNATIONAL FUNDS, INC., A CORPORATION, AND AIM ADVISORS, INC.,

Defendants.

[Filed Oct. 3, 2003]

FIRST AMENDED COMPLAINT

COMES NOW Plaintiffs, T.K. PARTHASARATHY, EDMUND WOODBURY, STUART ALLEN SMITH, and SHARON SMITH, individually and on behalf of all others similarly situated, by and through their undersigned counsel, and for their complaint against Defendants T. ROWE PRICE INTERNATIONAL FUNDS, INC., T. ROWE PRICE INTERNATIONAL, INC., ARTISAN FUNDS, INC., ARTISAN PARTNERS LIMITED PARTNERSHIP, AIM INTERNATIONAL FUNDS, INC., and AIM ADVISORS, INC, state as follows:

1. Plaintiff T.K. PARTHASARATHY is a resident of Glen Carbon, Madison County, Illinois.

2. Plaintiff EDMUND WOODBURY is a resident of Godfrey, Madison County, Illinois.

3. Plaintiff STUART ALLEN SMITH is a resident of Shiloh, St. Clair County, Illinois.

4. Plaintiff SHARON SMITH is a resident of Shiloh, St. Clair County, Illinois.

5. Defendant T. ROWE PRICE INTERNATIONAL FUNDS, INC. ("T. ROWE PRICE FUNDS") is a Maryland corporation with its principal place of business in Baltimore, Maryland. T. ROWE PRICE FUNDS is the sponsor of the T. ROWE PRICE INTERNATIONAL STOCK FUND ("T. ROWE PRICE INTERNATIONAL"). Defendant T. ROWE PRICE FUNDS does business in the state of Illinois and is registered as a mutual fund in the state of Illinois. Defendant T. ROWE PRICE FUNDS has consented to the jurisdiction of Illinois courts. Defendant T. ROWE PRICE FUNDS at all times relevant herein has promoted, marketed, and sold shares to the investing public nationwide including the state of Illinois. Defendant T. ROWE PRICE FUNDS maintains investor relationships nationwide including with shareholders in the state of Illinois. Defendant T. ROWE PRICE FUNDS has significant contacts with Madison County, and the activities complained of herein occurred, in whole or part, in Madison County, Illinois.

6. Defendant T. ROWE PRICE FUND MANAGER ("T. ROWE PRICE FUND MANAGER") is a Maryland corporation with its principal place of business in Baltimore, Maryland. The day-to-day tasks associated with running the business of T. Rowe Price International, such as investment management, share marketing, distribution, redemption, financial and regulatory reporting, and custodianship of funds, are contracted out since it has no significant number of internal employees. Defendant T. ROWE PRICE FUND MANAGER has been contracted to serve as the investment manager for the T. Rowe Price International. As the investment manager for T. Rowe Price International, Defendant T. ROWE PRICE FUND MANAGER selects

the fund's investments and operates or supervises most phases of the fund's business including the valuing of the fund's portfolio securities and the fund net asset value. Defendant T. ROWE PRICE FUND MANAGER has significant contacts with fund shareholders in Madison County as a result of its operation and supervision of T. ROWE PRICE INTERNATIONAL business, and the activities complained of herein occurred, in whole or in part, in Madison County, Illinois. Defendant T. ROWE PRICE FUND MANAGER utilizes an interactive web site to communicate with fund shareholders, including those in Madison County, Illinois, regarding the performance of the Fund and the investments it manages.

7. Defendant ARTISAN FUNDS, INC. ("ARTISAN FUNDS") is a Wisconsin corporation with its principal place of business in Milwaukee, Wisconsin. ARTISAN FUNDS is the sponsor of the ARTISAN INTERNATIONAL FUND ("ARTISAN INTERNATIONAL"). Defendant ARTISAN FUNDS does business in the state of Illinois and is registered as a mutual fund in the state of Illinois. Defendant ARTISAN FUNDS has consented to the jurisdiction of Illinois courts. Defendant ARTISAN FUNDS at all times relevant herein has promoted, marketed, and sold shares to the investing public nationwide including the state of Illinois. Defendant ARTISAN FUNDS maintains investor relationships nationwide including with shareholders in the state of Illinois. Defendant ARTISAN FUNDS has significant contacts with Madison County, and the activities complained of herein occurred, in whole or part, in Madison County, Illinois.

8. Defendant ARTISAN PARTNERS LIMITED PARTNERSHIP ("ARTISAN FUND MANAGER") is a Delaware partnership with its principal place of business in Milwaukee, Wisconsin. The day-to-day tasks associated with running the business of ARTISAN INTERNATIONAL, such as investment management, share marketing, distribution, redemption, financial and regulatory reporting, and custodianship of funds, are contracted out since it has no significant number of internal employees. Defendant ARTISAN

FUND MANAGER has been contracted to serve as the investment manager for Artisan International. As the investment manager for ARTISAN INTERNATIONAL, Defendant ARTISAN FUND MANAGER selects the fund's investments and operates or supervises most phases of the fund's business including the valuing of the fund's portfolio securities and the fund net asset value. Defendant ARTISAN FUND MANAGER has significant contacts with fund shareholders in Madison County as a result of its operation and supervision of Artisan International business, and the activities complained of herein occurred, in whole or in part, in Madison County, Illinois. Defendant ARTISAN FUND MANAGER utilizes an interactive website to communicate with fund shareholders, including those in Madison County, Illinois, regarding the performance of the Fund and the investments it manages.

9. Defendant AIM INTERNATIONAL FUNDS, INC. ("AIM FUNDS") is a Maryland corporation with its principal place of business in Houston, Texas. AIM FUNDS is the sponsor of the AIM EUROPEAN GROWTH FUND ("AIM EUROPEAN"). Defendant AIM FUNDS does business in the state of Illinois and is registered as a mutual fund in the state of Illinois. Defendant AIM FUNDS has consented to the jurisdiction of Illinois courts. Defendant AIM FUNDS at all times relevant herein has promoted, marketed, and sold shares to the investing public nationwide including the state of Illinois. Defendant AIM FUNDS maintains investor relationships nationwide including with shareholders in the state of Illinois. Defendant AIM FUNDS has significant contacts with Madison County, and the activities complained of herein occurred, in whole or part, in Madison County, Illinois.

10. Defendant AIM ADVISORS, INC. ("AIM FUND MANAGER") is a Delaware corporation with its principal place of business in Houston, Texas. The day-to-day tasks associated with running the business of AIM European, such as investment management, share marketing, distribution, redemption, financial and regulatory reporting, and

custodianship of funds, are contracted out since it has no significant number of internal employees. Defendant AIM FUND MANAGER has been contracted to serve as the investment manager for the AIM European. As the investment manager for AIM European, Defendant AIM FUND MANAGER selects the fund's investments and operates or supervises most phases of the fund's business including the valuing of the fund's portfolio securities and the fund net asset value. Defendant AIM FUND MANAGER has significant contacts with fund shareholders in Madison County as a result of its operation and supervision of AIM European business, and the activities complained of herein occurred, in whole or in part, in Madison County, Illinois. Defendant AIM FUND MANAGER utilizes an interactive website to communicate with fund shareholders, including those in Madison County, Illinois, regarding the performance of the Fund and the investments it manages.

11. At all times relevant herein, Plaintiff T.K. PARTHASARATHY has owned and held shares in the ARTISAN INTERNATIONAL FUND for the purpose of long term investing in international securities.

12. At all times relevant herein, Plaintiff EDMUND WOODBURY and has owned and held shares of T. Rowe Price International for the purpose of long term investing in international securities.

13. At all times relevant herein, Plaintiffs STUART ALLEN SMITH and SHARON SMITH have owned and held shares of AIM EUROPEAN for the purpose of long term investing in international securities.

14. This Court has jurisdiction over the subject matter and the parties pursuant to 735 ILCS 5/2-209.

15. Venue is proper in this Court pursuant to 735 ILCS 5/2-101.

16. The foreign securities purchased by Defendants' Funds for their portfolios are principally traded in securities markets outside of the United States.

17. Open end mutual funds such as Defendants' Funds have been tremendously successful in convincing investors such as plaintiffs to hold their fund shares by urging investors to invest for the long term and by effectively marketing the various advantages of long term ownership of funds over direct investment including professional management, diversification, and liquidity.

18. Shares of open end mutual funds are sold to investors such as Plaintiffs at a price based upon the net asset value ("NAV") per share plus applicable sales charges. Investors in shares may redeem their shares at the NAV of the shares less any redemption charges.

19. The share prices (NAV) of Defendants' mutual funds are set by deducting the fund liabilities from the total assets of the portfolio and then dividing by the number of outstanding shares.

20. Because the sales and redemption prices are based upon NAV, which in turn depends upon the fluctuating value of the fund's underlying portfolio of securities, Defendants recalculate the fund net asset value every business day. Defendants set the fund share price (NAV) once every business day at the close of trading on the New York Stock Exchange at 4:00 p.m. Eastern Time. The NAV of the shares is reported by Defendants to the National Association of Securities Dealers (NASD) for public distribution.

21. In valuing its underlying assets for purposes of setting the NAV, Defendants use the last trade price in the home market of each of the securities in its portfolio. A significant portion of the securities in the Defendants' portfolios are foreign securities. The home markets for such foreign securities include London, Paris, Frankfurt, Moscow, Singapore, Kuala Lumpur, Hong Kong, Taipei, Tokyo and Sydney. These markets are located in time zones that are five hours to fifteen hours ahead of Eastern Standard Time.

22. Studies of world financial markets have established associations between the value changes among various markets. There is a positive correlation between value movements in the United States market and value movements in foreign markets. If the United States market experiences an upward movement in values, it can be predicted that Asian markets will move upward once trading begins their next day. The same upward movement can be predicted for European markets once trading begins their next day. Similarly, if the United States market experiences a downward movement in values, it can be predicted that Asian and European markets will move downward once trading begins their next day. Because of these positive correlations, the closing prices of the foreign securities in the underlying portfolio may not reflect current market values at the time Defendants set their fund NAV. Appropriate adjustments need to be made to the closing prices of the foreign securities in order to reflect current market values. Despite knowledge of the United States market result, the positive correlations and the stale price of the foreign securities in its underlying portfolio, Defendants do not make any value adjustment to the portfolio's foreign securities prior to calculating fund NAV and setting share price every business day.

23. The positive correlation between the upward or downward movement of value in the United States market and subsequent movements in foreign markets around the world is between 0.7 and 0.8. A value of 0.0 equates to absolutely no correlation between value movements in United States markets and subsequent movements in foreign markets. A value of 1.0 equates to an absolute correlation between value movements in United States markets and subsequent value movements in foreign markets.

24. Studies of world financial markets demonstrate that the greater the percentage increase or decrease in the value of United States markets, the more likely foreign markets will post corresponding value movements on subsequent days. The probability that the value movements

of foreign markets will follow the previous day's value movements in United States markets is directly correlated with the degree or extent of the value movement of United States markets.

25. Since many of the home markets for the foreign securities in the Defendants' asset portfolio last traded hours before the setting at 4:00 p.m. Eastern of the fund NAV, the closing prices used to calculate the NAV of Defendants' funds are stale and do not reflect price relevant information available subsequent to the foreign security's last trade that will affect the value of such security.

26. During the interval that elapses between the time that Defendants set their share NAV (and release it to the NASD for communication to the public) on consecutive days, the securities markets in Australia, Japan, Taiwan, Hong Kong, Malaysia, Singapore, Russia, Germany, France and the United Kingdom have traded for an entire session from open to close.

27. The exchange located in Sydney, Australia observes normal market trading hours of 10:00 a.m. to 4:00 p.m. local time. Active trading of securities traded on this exchange ends, and closing prices for those securities are posted, at 4:00 p.m. local time (2:00 a.m. Eastern time). When Defendants calculate their fund NAV using closing prices from this exchange, Defendants rely upon closing prices for securities traded on this exchange that have been static for 14 hours.

28. The exchange located in Tokyo, Japan observes normal trading hours of 9:00 a.m. to 3:00 p.m. local time. Active trading of securities traded on this exchange ends, and closing prices for those securities are posted, at 3:00 p.m. local time (2:00 a.m. Eastern time). When Defendants calculate their fund NAV using closing prices from this exchange, Defendants rely upon closing prices for securities traded on this exchange that have been static for 14 hours.

29. The exchange located in Taipei, Taiwan observes normal trading hours of 9:00 a.m. to 1:30 p.m. local time. Active trading of securities traded on this exchange ends, and closing prices for those securities are posted, at 1:30 p.m. local time (1:30 a.m. Eastern time). When Defendants calculate their fund NAV using closing prices from this exchange, Defendants rely upon closing prices for securities traded on this exchange that have been static for 14.5 hours.

30. The exchange located in Hong Kong observes normal trading hours of 10:00 a.m. to 4:00 p.m. local time. Active trading of securities traded on this exchange ends, and closing prices for those securities are posted, at 4:00 p.m. local time (4:00 a.m. Eastern time). When Defendants calculate its fund NAV using closing prices from this exchange, Defendants rely upon closing prices for securities traded on this exchange that have been static for 12 hours.

31. The exchange located in Kuala Lumpur, Malaysia observes normal trading hours of 9:30 a.m. to 5:00 p.m. local time. Active trading of securities traded on this exchange ends, and closing prices for those securities are posted, at 5:00 p.m. local time (5:00 a.m. Eastern time). When Defendants calculate their fund NAV using closing prices from this exchange, Defendants rely upon closing prices for securities traded on this exchange that have been static for 11 hours.

32. The exchange located in Singapore observes normal trading hours of 9:00 a.m. to 5:00 p.m. local time. Active trading of securities traded on this exchange ends, and closing prices for those securities are posted, at 5:00 p.m. local time (5:00 a.m. Eastern time). When Defendants calculate their fund NAV using closing prices from this exchange, Defendants rely upon closing prices for securities traded on this exchange that have been static for 11 hours.

33. The exchange located in Moscow, Russia observes normal trading hours of 12:00 p.m. to 7:00 p.m. local time.

Active trading of securities traded on this exchange ends, and closing prices for those securities are posted, at 7:00 p.m. local time (11:00 a.m. Eastern time). When Defendants calculate their fund NAV using closing prices from this exchange, Defendants rely upon closing prices for securities traded on this exchange that have been static for 5 hours.

34. The exchange located in Frankfurt, Germany observes normal trading hours of 9:00 a.m. to 8:00 p.m. local time. Active trading of securities traded on this exchange ends, and closing prices for those securities are posted, at 8:00 p.m. local time (2:00 p.m. Eastern time). When Defendants calculate their fund NAV using closing prices from this exchange, Defendants rely upon closing prices for securities traded on this exchange that have been static for 2 hours.

35. The exchange located in Paris, France observes normal trading hours of 9:00 a.m. to 5:30 p.m. local time. Active trading of securities traded on this exchange ends, and closing prices for those securities are posted at, 5:30 p.m. local time (11:30 a.m. Eastern time). When Defendants calculate their fund NAV, using closing prices from this exchange Defendants rely upon closing prices for securities traded on this exchange that have been static for 4.5 hours.

36. The exchange located in London, England observes normal market hours of 8:00 a.m. to 4:30 p.m. local time. Active trading of securities traded on this exchange ends, and closing prices for those securities are posted at 4:30 p.m. local time (11:30 a.m. Eastern time). When Defendants calculate their fund NAV using closing prices from this exchange, Defendants rely upon closing prices for securities traded on this exchange that have been static for 4.5 hours.

37. A significant portion of the underlying foreign securities in the Defendants' portfolios are listed on foreign exchanges and trade during each market's respective ses-

sion. The NAVs set by Defendants do not take into account on a daily basis any price relevant information that has become available in this two to fourteen and one/half hour interval, after the final prices for the underlying foreign securities have been posted but, prior to the setting of the NAVs. Such price relevant information impacts the valuation of these underlying foreign securities and is significant for valuation because the final market prices have become stale and do not reflect the current market value of the securities.

38. By failing to make daily adjustments based upon positive correlations between upward or downward movements in United States and foreign markets and by choosing to use stale prices in valuing their fund shares and setting their daily NAVs, Defendants have exposed long term shareholders to market timing traders who regularly purchase and redeem Defendants' shares as part of a profitable trading strategy. The market timing trading strategy stems from the ability of market timing traders to predict changes in the NAV. Market timing traders are able to predict changes in the NAV because of the positive correlations between value movements in United States markets and foreign markets. The stale price strategy of market timers who trade Defendants' shares is to buy shares on days when the United States market moves up and to sell (redeem) shares when the United States market moves down. In order to derive maximum benefit from price relevant information developed subsequent to the now stale closing prices of the portfolio securities, market timers wait until the fund deadline for buying or selling (redeeming) shares in Defendants' funds on any particular business day. Because Defendants cannot buy or sell the foreign securities in the funds' underlying portfolio (due to the time difference between New York and the home markets of the foreign securities) at the time it sets the daily NAV that values the shares it issues and redeems, the shares that Defendants issue to and redeem from market timers do not reflect current market prices of the foreign securities held by the fund.

39. Due to the use of stale prices by Defendants in valuing the fund shares, market timers who buy Defendants' funds' shares on days when the United States market moves up are buying discounted shares at the expense of other fund shareholders because the funds underlying foreign securities assets are undervalued as of the time of the share purchase.

40. Due to the use of stale prices by Defendants in valuing their fund shares, market timers who sell (redeem) Defendants' shares on days when the United States market moves down are selling (redeeming) shares at a premium at the expense of other fund shareholders because the underlying foreign securities assets are overvalued as of the time of the share sale (redemption).

41. Shares in Defendants' funds can be traded, either by purchase or redemption, only once a day at 4:00 p.m. Eastern Time.

42. The excess profits that are obtained by market timing traders' taking advantage of the stale pricing of Defendants' shares come at the expense of fellow shareholders who are non-trading long term buy and hold investors. The transfer of wealth from the non-trading long term buy and hold shareholders to the market timers trading Defendants shares in Defendants' funds occurs through dilution.

43. Market timing traders pay cash to Defendants funds when they purchase discounted shares. Market timing traders receive cash from Defendants funds when they sell (redeem) their shares at a premium. Defendants' fund NAV is diluted in both instances. When market timing traders are able to buy shares at a discount, Defendants' fund assets suffer dilution because the cash received by the fund for the shares purchased is less than the per share value of the underlying foreign securities because of the stale pricing utilized by Defendants. Likewise, when market timing traders are able to sell (redeem) shares at a premium, Defendants' fund assets suffer dilution because

the cash paid out by the fund for the shares redeemed is more than the per share value of the underlying securities, again due to the stale pricing utilized by Defendants. In both instances, when Defendants receive less cash when issuing and pay out more cash when redeeming market timing trader shares than supported by the value of their underlying foreign securities, the result is a dilution of Defendants' cash. Since the cash held by the fund is one of the assets that is valued in setting the Defendants' daily fund NAV, it follows that the diluted fund cash position causes the fund NAV to be diluted as well. Due to the stale pricing utilized by Defendants, long term buy and hold shareholders have incurred a dilution in the NAV of their shares and the wealth represented by that diluted amount has been transferred to market timing traders.

44. By failing to make daily adjustments based upon positive correlations between upward movements in United States and foreign markets and by choosing to use stale prices in valuing the underlying foreign securities that are used setting their daily NAV, Defendants give market timing traders the opportunity to earn vastly higher returns at no additional risk. Unlike other market timing based trading, market timers who trade Defendants shares do not have to look into the future to time their purchases and redemptions of shares, rather, they have the luxury of being able to look backwards because Defendants' share pricing fails to adjust for recognized positive correlations and uses stale prices in valuing its underlying portfolio securities.

45. Since it is such an attractive low risk trading vehicle to market timers, Defendants' funds experience increased trading and transaction costs, disruption of planned investment strategies, forced and unplanned portfolio turnover including the liquidation of investments to meet market timer redemption requests, lost opportunity costs and asset swings that negatively impact fund operations and performance and the ability of the fund to provide a maximized return to long term shareholders.

46. Plaintiffs bring this complaint as a class action against Defendants T. ROWE PRICE FUNDS, T. ROWE PRICE FUND MANAGER, ARTISAN FUNDS, ARTISAN FUND MANAGER, AIM FUNDS, AND AIM FUND MANAGER, and pursuant to § 5/2-801 *et seq.*, of the Illinois Code of Civil Procedure individually and on behalf of a class of all persons in the United States who have owned shares T. ROWE PRICE INTERNATIONAL, ARTISAN INTERNATIONAL, AND AIM EUROPEAN GROWTH for more than fourteen days from the date of purchase to the date of sale (redemption) or exchange ("long term shareholders"). The class period commences five years prior to the filing of this complaint through the date of filing. Excluded from the class are Defendants, any parent, subsidiary, affiliate, or controlled person of Defendants, as well as the officers, directors, agents, servants or employees of Defendants, and the immediate family member of any such person. Also excluded is any judge who may preside over this case.

47. Plaintiffs are members of the class and will fairly and adequately assert and protect the interests of the class. The interests of the Plaintiffs are coincident with, and not antagonistic to, those of other members of the class. Plaintiffs have retained attorneys who are experienced in class action litigation.

48. Members of the class are so numerous that joinder of all members is impracticable.

49. Common questions of law or fact predominate over any questions affecting only individual members of the Class. Common questions include, but are not limited to, the following:

i. whether defendants failed to properly evaluate on a daily basis whether a significant event affecting the value of T. Rowe Price International, Artisan International and AIM European Growth's portfolios of securities had occurred after the foreign home markets for such securities had closed but before the fund's NAV calculation and share price setting;

ii. whether defendants failed to properly implement T. Rowe Price International, Artisan International and AIM European Growth's portfolios valuation and share pricing policies and procedures making daily adjustments based upon United States market results and recognized positive correlations between upward movements in United States and foreign markets in the valuation of the fund's portfolio securities prior to the calculation of the fund NAV and setting of the share price;

iii. whether defendants failed to properly implement T. Rowe Price International, Artisan International and AIM European Growth's portfolios valuation and share pricing policies and procedures making daily adjustments to stale closing prices of the underlying portfolio securities before the fund's NAV calculation and share price setting;

iv. whether defendants failed to properly implement T. Rowe Price International, Artisan International and AIM European Growth's portfolios valuation and share pricing policies so as to require the use of fair value pricing on a daily basis to value portfolio securities and fund NAV and share prices when closing prices of portfolio securities did not reflect their market values;

v. whether defendants failed to protect T. Rowe Price International, Artisan International and AIM European Growth's long term shareholders from market timing traders of fund shares who use T. Rowe Price International, Artisan International and AIM European Growth's shares as a trading vehicle to earn profits at the expense of long term shareholders because of the failure of T. ROWE PRICE FUNDS, T. ROWE PRICE FUND MANAGER, ARTISAN FUNDS, ARTISAN FUND MANAGER, AIM FUNDS, and AIM FUND MANAGER to make daily adjustments, based upon known United States market results and recognized positive correlations be-

tween upward movements in United States and foreign markets, prior to the daily calculation of the fund NAV and the setting of share prices as well as their use of stale prices in the valuation of the fund's portfolio securities prior to the daily calculation of the fund NAV and the setting of share prices;

vi. whether defendants breached the duties they owed to plaintiffs and the class;

vii. whether plaintiffs and the class have been damaged and, if so,

viii. the extent of such damages.

50. The prosecution of separate actions by individual members of the Class would create a risk of:

i. inconsistent or varying adjudications with respect to individual members of the class; and

ii. adjudication with respect to individual members of the class, which would, as a practical matter, be dispositive of the interests of other members not parties to the adjudication or substantially impair or impede their ability to protect their interest.

51. The class action method is appropriate for the fair and efficient prosecution of this action.

52. Individual litigation of all claims, which might be brought by all class members would produce a multiplicity of cases so that the judicial system would be congested for years. Class treatment, by contrast, provides manageable judicial treatment calculated to bring a rapid conclusion to all litigation of all claims arising from the conduct of the defendants.

Count I

COMES NOW Plaintiff T.K. PARTHASARATHY, individually and on behalf of all others similarly situated, by and through his undersigned counsel, and for Count I of his

Complaint against Defendants ARTISAN FUNDS and ARTISAN FUND MANAGER, states as follows:

53. Plaintiff repeats and incorporates by reference paragraphs 1 through 55 as if fully set forth herein.

54. Defendant ARTISAN FUNDS operates ARTISAN INTERNATIONAL FUND as an open end mutual fund with the stated goal of providing long term capital growth to investors who hold shares of the fund. The fund expressly states in its prospectus that it seeks to achieve its investment goal through a policy of investing in stocks and debt obligations of companies outside of the United States.

55. Defendant ARTISAN FUND MANAGER serves as the investment manager for Artisan International. Defendant ARTISAN FUND MANAGER provides, among other things, portfolio management services and selects the securities for ARTISAN INTERNATIONAL to buy, hold or sell. ARTISAN INTERNATIONAL pays Defendant ARTISAN FUND MANAGER set fees based on the percentage of assets under management for managing Artisan International's assets. Defendant ARTISAN FUND MANAGER's compensation and management of the Artisan International Fund are required to be reviewed and approved by Defendant ARTISAN FUNDS' board of directors.

56. At all times relevant hereto, Plaintiff Parthasarathy has owned shares in Artisan International.

57. In undertaking their role as investment managers with respect to the Funds, Defendants directly or impliedly held themselves out as skilled specialists in the field of investment management, possessing the knowledge, skill and care ordinarily used by reasonably well-qualified members of their profession.

58. It thereby became the duty of Defendants to exercise that degree of knowledge, skill and care ordinarily used by reasonably well-qualified members of their profession.

59. Defendants knew, or were negligent in not knowing, that the closing prices for the foreign securities represented in the Artisan International Fund and used by Defendants to calculate NAV for said Fund did not represent fair value because, inter alia, those prices did not reflect changes in trading prices as a result of trading which Defendants knew, or were negligent in not knowing, occurred daily after the closing of the New York Stock Exchange.

60. Defendants breached their duties of due care owed to Plaintiff Parthasarathy and similarly situated owners of the Artisan International Fund by, inter alia:

i. failing to properly evaluate on a daily basis whether a significant event affecting the value of Artisan International's portfolio of securities had occurred after the foreign trading markets for such securities had closed but before Defendants calculated NAV and share prices;

ii. failing to implement Artisan International's portfolio valuation and share pricing policies and procedures; and

iii. allowing portfolio valuation and share pricing policies and procedures which benefited market timing traders of Artisan International's shares at the expense of long term shareholders.

61. As a direct and proximate result of the Defendants' breach of their duties, Plaintiff Parthasarathy and the class have suffered damages in the amount to be proven at trial, but less than $75,000 per plaintiff or class member, including all compensatory damages, punitive damages, attorneys' fees and costs.

WHEREFORE, Plaintiff and the Class pray that the Court enter judgment in their favor and against ARTISAN FUNDS, INC. and ARTISAN PARTNERS LIMITED PARTNERSHIP, as follows:

A. Ordering that this action be maintained as a class action pursuant to 735 ILCS 5/2 801 and the following class be certified:

> All persons in the United States who held shares in the T. Rowe Price International Stock Fund, Artisan International Fund or AIM European Growth, for a period of more than fourteen days before redeeming or exchanging them during the period beginning from five years prior to and through the date of the filing of this complaint;

B. Awarding Plaintiff and the Class compensatory damages, prejudgment interest, costs of suits, punitive damages and attorneys' fees for an amount representing the damages caused by Defendants' breach of their duties not to exceed $75,000 per plaintiff or class member.

PLAINTIFFS DEMAND TRIAL BY JURY

Count II

COMES NOW Plaintiff T.K. PARTHASARATHY, individually and on behalf of all others similarly situated, by and through his undersigned counsel, and for Count II of his Complaint against Defendants ARTISAN FUNDS and ARTISAN FUND MANAGER, states as follows:

62. Plaintiff repeats and incorporates by reference paragraphs 1 through 52 and 54 through 59 as if fully set forth herein.

63. On or about January 1, 1965, applicable published regulations expressly recognized that changes in trading prices of securities in the Artisan International Fund might occur daily after the closing of the New York Stock Exchange.

64. With utter indifference and conscious disregard for Plaintiff Parthasarathy's investment and the investments of similarly situated fund owners, Defendants willfully and wantonly breached their duties to Plaintiff Parthasarathy and similarly situated owners by, inter alia:

i. failing to know and implement applicable rules and regulations concerning the calculation of NAV;

ii. failing to properly evaluate on a daily basis whether a significant event affecting the value of Artisan International's portfolio of securities had occurred after the foreign trading markets for such securities had closed but before Defendants calculated NAV and share prices;

iii. failing to implement Artisan International's portfolio valuation and share pricing policies and procedures; and

iv. allowing portfolio valuation and share pricing policies and procedures which benefited market timing traders of Artisan International's shares at the expense of long term shareholders.

65. As a direct and proximate result of the Defendants' breach of their duties, Plaintiff Parthasarathy and the class have suffered damages in the amount to be proven at trial, but less than $75,000 per plaintiff or class member, including all compensatory damages, punitive damages, attorneys' fees and costs.

WHEREFORE, Plaintiff and the Class pray that the Court enter judgment in their favor and against ARTISAN FUNDS, INC. and ARTISAN PARTNERS LIMITED PARTNERSHIP, as follows:

A. Ordering that this action be maintained as a class action pursuant to 735 ILCS 5/2 801 and the following class be certified:

> All persons in the United States who held shares in the T. Rowe Price International Stock Fund, Artisan International Fund, or AIM European Growth, for a period of more than fourteen days before redeeming or exchanging them during the period beginning from five years prior to and through the date of the filing of this complaint;

B. Awarding Plaintiff and the Class compensatory damages, prejudgment interest, costs of suits, punitive damages and attorneys' fees for an amount representing the damages caused by Defendants' breach of their duties not to exceed $75,000 per plaintiff or class member.

PLAINTIFFS DEMAND TRIAL BY JURY

Count III

COMES NOW Plaintiff EDMUND WOODBURY, individually and on behalf of all others similarly situated, by and through his undersigned counsel, and for Count III of his Complaint against Defendants T. ROWE PRICE FUNDS and T. ROWE PRICE FUND MANAGER, states as follows:

66. Plaintiff repeats and incorporates by reference paragraphs 1 through 52 as if fully set forth herein.

67. Defendant T. Rowe Price Funds operates T. Rowe Price International Fund as an open end mutual fund with the stated goal of providing long term capital growth to investors who hold shares of the fund. The fund expressly states in its prospectus that it seeks to achieve its investment goal through a policy of investing in stocks and debt obligations of companies outside of the United States.

68. Defendant T. Rowe Price Fund Manager serves as the investment manager for T. Rowe Price International. Defendant T. Rowe Price Fund Manager provides, among other things, portfolio management services and selects the securities for T. Rowe Price International to buy, hold or sell. T. Rowe Price International pays Defendant T. Rowe Price Fund Manager set fees based on the percentage of assets under management for managing T. Rowe Price International's assets. Defendant T. Rowe Price Fund Manager's compensation and management of the T. Rowe Price International Fund are required to be reviewed and approved by Defendant T. Rowe Price Funds' board of directors.

69. At all times relevant hereto, Plaintiff Woodbury has owned shares in T. Rowe Price International.

70. In undertaking their role as investment managers with respect to the Funds, Defendants directly or impliedly held themselves out as skilled specialists in the field of investment management, possessing the knowledge, skill and care ordinarily used by reasonably well-qualified members of their profession.

71. It thereby became the duty of Defendants to exercise that degree of knowledge, skill and care ordinarily used by reasonably well-qualified members of their profession.

72. Defendants knew, or were negligent in not knowing, that the closing prices for the foreign securities represented in the T. Rowe Price International Fund and used by Defendants to calculate NAV for said Fund did not represent fair value because, inter alia, those prices did not reflect changes in trading prices as a result of trading which Defendants knew, or were negligent in not knowing, occurred daily after the closing of the New York Stock Exchange.

73. Defendants breached their duties of due care owed to Plaintiff Woodbury and similarly situated owners of the T. Rowe Price International Fund by, inter alia:

i. failing to properly evaluate on a daily basis whether a significant event affecting the value of T. Rowe Price International's portfolio of securities had occurred after the foreign trading markets for such securities had closed but before Defendants calculated NAV and share prices;

ii. failing to implement T. Rowe Price International's portfolio valuation and share pricing policies and procedures; and

iii. allowing portfolio valuation and share pricing policies and procedures which benefited market timing traders of T. Rowe Price International's shares at the expense of long term shareholders.

74. As a direct and proximate result of the Defendants' breach of their duties, Plaintiff Woodbury and the class

have suffered damages in the amount to be proven at trial, but less than $75,000 per plaintiff or class member, including all compensatory damages, punitive damages, attorneys' fees and costs.

WHEREFORE, Plaintiff and the Class pray that the Court enter judgment in their favor and against T. ROWE PRICE INTERNATIONAL FUNDS, INC. and T. ROWE PRICE FUND MANAGER, as follows:

A. Ordering that this action be maintained as a class action pursuant to 735 ILCS 5/2 801 and the following class be certified:

> All persons in the United States who held shares in the T. Rowe Price International Stock Fund, Artisan International Fund, or AIM European Growth, for a period of more than fourteen days before redeeming or exchanging them during the period beginning from five years prior to and through the date of the filing of this complaint;

B. Awarding Plaintiff and the Class compensatory damages, prejudgment interest, costs of suits, punitive damages and attorneys' fees for an amount representing the damages caused by Defendants' breach of their duties not to exceed $75,000 per plaintiff or class member.

PLAINTIFFS DEMAND TRIAL BY JURY

Count IV

COMES NOW Plaintiff EDMUND WOODBURY, individually and on behalf of all others similarly situated, by and through his undersigned counsel, and for Count IV of his Complaint against Defendants T. ROWE PRICE FUNDS and T. ROWE PRICE FUND MANAGER, states as follows:

75. Plaintiff repeats and incorporates by reference paragraphs 1 through 52 and 67 through 72 as if fully set forth herein.

76. On or about January 1, 1965, applicable published regulations expressly recognized that changes in trading prices of securities in the T. Rowe Price International

Fund might occur daily after the closing of the New York Stock Exchange.

77. With utter indifference and conscious disregard for Plaintiff Woodbury's investment and the investments of similarly situated fund owners, Defendants willfully and wantonly breached their duties to Plaintiff Woodbury and similarly situated owners by, inter alia:

i. failing to know and implement applicable rules and regulations concerning the calculation of NAV;

ii. failing to properly evaluate on a daily basis whether a significant event affecting the value of T. Rowe Price International's portfolio of securities had occurred after the foreign trading markets for such securities had closed but before Defendants calculated NAV and share prices;

iii. failing to implement T. Rowe Price International's portfolio valuation and share pricing policies and procedures; and

iv. allowing portfolio valuation and share pricing policies and procedures which benefited market timing traders of T. Rowe Price International's shares at the expense of long term shareholders.

78. As a direct and proximate result of the Defendants' breach of their duties, Plaintiff Woodbury and the class have suffered damages in the amount to be proven at trial, but less than $75,000 per plaintiff or class member, including all compensatory damages, punitive damages, attorneys' fees and costs.

WHEREFORE, Plaintiff and the Class pray that the Court enter judgment in their favor and against T. ROWE PRICE INTERNATIONAL FUNDS, INC. and T. ROWE PRICE FUND MANAGER, as follows:

A. Ordering that this action be maintained as a class action pursuant to 735 ILCS 5/2 801 and the following class be certified:

All persons in the United States who held shares in the T. Rowe Price International Stock Fund, Artisan

International Fund, or AIM European Growth, for a period of more than fourteen days before redeeming or exchanging them during the period beginning from five years prior to and through the date of the filing of this complaint;

B. Awarding Plaintiff and the Class compensatory damages, prejudgment interest, costs of suits, punitive damages and attorneys' fees for an amount representing the damages caused by Defendants' breach of their duties not to exceed $75,000 per plaintiff or class member.

PLAINTIFFS DEMAND TRIAL BY JURY

Count V

COMÉ NOW Plaintiffs STUART ALLEN SMITH and SHARON SMITH, individually and on behalf of all others similarly situated, by and through their undersigned counsel, and for Count V of their Complaint against Defendants AIM FUNDS and AIM FUND MANAGER, state as follows:

79. Plaintiffs repeat and incorporate by reference paragraphs 1 through 52 as if fully set forth herein.

80. Defendant AIM Funds operates AIM European Fund as an open end mutual fund with the stated goal of providing long term capital growth to investors who hold shares of the fund. The fund expressly states in its prospectus that it seeks to achieve its investment goal through a policy of investing in stocks and debt obligations of companies outside of the United States.

81. Defendant AIM Fund Manager serves as the investment manager for AIM International. Defendant AIM Fund Manager provides, among other things, portfolio management services and selects the securities for AIM European to buy, hold or sell. AIM European pays Defendant AIM Fund Manager set fees based on the percentage of assets under management for managing AIM European's assets. Defendant AIM Fund Manager's compensation and management of the AIM European Fund are re-

quired to be reviewed and approved by Defendant AIM Funds' board of directors.

82. At all times relevant hereto, Plaintiffs Stuart Allen and Sharon Smith have owned shares in AIM European.

83. In undertaking their role as investment managers with respect to the Funds, Defendants directly or impliedly held themselves out as skilled specialists in the field of investment management, possessing the knowledge, skill and care ordinarily used by reasonably well-qualified members of their profession.

84. It thereby became the duty of Defendants to exercise that degree of knowledge, skill and care ordinarily used by reasonably well-qualified members of their profession.

85. Defendants knew, or were negligent in not knowing, that the closing prices for the foreign securities represented in the AIM European Fund and used by Defendants to calculate NAV for said Fund did not represent fair value because, inter alia, those prices did not reflect changes in trading prices as a result of trading which Defendants knew, or were negligent in not knowing, occurred daily after the closing of the New York Stock Exchange.

86. Defendants breached their duties of due care owed to Plaintiffs Stuart Allen and Sharon Smith and similarly situated owners of the AIM European Fund by, inter alia:

i. failing to properly evaluate on a daily basis whether a significant event affecting the value of AIM European's portfolio of securities had occurred after the foreign trading markets for such securities had closed but before Defendants calculated NAV and share prices;

ii. failing to implement AIM European's portfolio valuation and share pricing policies and procedures; and

iii. allowing portfolio valuation and share pricing policies and procedures which benefited market timing

traders of AIM European's shares at the expense of long term shareholders.

87. As a direct and proximate result of the Defendants' breach of their duties, Plaintiffs Stuart Allen and Sharon Smith and the class have suffered damages in the amount to be proven at trial, but less than $75,000 per plaintiff or class member, including all compensatory damages, punitive damages, attorneys' fees and costs.

WHEREFORE, Plaintiffs and the Class pray that the Court enter judgment in their favor and against AIM INTERNATIONAL FUNDS, INC. and AIM ADVISORS, INC., as follows:

A. Ordering that this action be maintained as a class action pursuant to 735 ILCS 5/2 801 and the following class be certified:

> All persons in the United States who held shares in the T. Rowe Price International Stock Fund, Artisan International Fund, or AIM European Growth for a period of more than fourteen days before redeeming or exchanging them during the period beginning from five years prior to and through the date of the filing of this complaint;

B. Awarding Plaintiffs and the Class compensatory damages, prejudgment interest, costs of suits, punitive damages and attorneys' fees for an amount representing the damages caused by Defendants' breach of their duties not to exceed $75,000 per plaintiff or class member.

PLAINTIFFS DEMAND TRIAL BY JURY

Count VI

COME NOW Plaintiffs STUART ALLEN SMITH and SHARON SMITH, individually and on behalf of all others similarly situated, by and through their undersigned counsel, and for Count VI of their Complaint against Defendants AIM FUNDS and AIM FUND MANAGER, state as follows:

88. Plaintiffs repeat and incorporate by reference paragraphs 1 through 52 and 80 through 85 as if fully set forth herein.

89. On or about January 1, 1965, applicable published regulations expressly recognized that changes in trading prices of securities in the AIM European Fund might occur daily after the closing of the New York Stock Exchange.

90. With utter indifference and conscious disregard for Plaintiffs Stuart Allen and Sharon Smith's investment and the investments of similarly situated fund owners, Defendants willfully and wantonly breached their duties to Plaintiffs Stuart Allen and Sharon Smith and similarly situated owners by, inter alia:

i. failing to know and implement applicable rules and regulations concerning the calculation of NAV;

ii. failing to properly evaluate on a daily basis whether a significant event affecting the value of AIM European's portfolio of securities had occurred after the foreign trading markets for such securities had closed but before Defendants calculated NAV and share prices;

iii. failing to implement AIM European's portfolio valuation and share pricing policies and procedures; and

iv. allowing portfolio valuation and share pricing policies and procedures which benefited market timing traders of AIM European's shares at the expense of long term shareholders.

91. As a direct and proximate result of the Defendants' breach of their duties, Plaintiffs Stuart Allen and Sharon Smith and the class have suffered damages in the amount to be proven at trial, but less than $75,000 per plaintiff or class member, including all compensatory damages, punitive damages, attorneys' fees and costs.

WHEREFORE, Plaintiffs and the Class pray that the Court enter judgment in their favor and against AIM

INTERNATIONAL FUNDS, INC. and AIM ADVISORS, INC., as follows:

A. Ordering that this action be maintained as a class action pursuant to 735 ILCS 5/2 801 and the following class be certified:

> All persons in the United States who held shares in the T. Rowe Price International Stock Fund, Artisan International Fund, or AIM European Growth for a period of more than fourteen days before redeeming or exchanging them during the period beginning from five years prior to and through the date of the filing of this complaint;

B. Awarding Plaintiffs and the Class compensatory damages, prejudgment interest, costs of suits, punitive damages and attorneys' fees for an amount representing the damages caused by Defendants' breach of their duties not to exceed $75,000 per plaintiff or class member.

PLAINTIFFS DEMAND TRIAL BY JURY

[attorney name and address blocks omitted]

IN THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

Cause No. 03-L-1539

STEVE AND BETH DUDLEY,
INDIVIDUALLY AND ON BEHALF OF ALL OTHERS
SIMILARLY SITUATED,
Plaintiffs,

v.

PUTNAM INTERNATIONAL EQUITY FUND AND
PUTNAM INVESTMENT MANAGEMENT, LLC,
Defendants.

[Filed Nov. 10, 2003]

COMPLAINT

Plaintiffs, Steve and Beth Dudley, individually and on behalf of all others similarly situated, by and through their undersigned counsel, and for their complaint against Defendants Putnam International Equity Fund and Putnam Investment Management, LLC, state as follows:

1. Plaintiffs, Steve and Beth Dudley, are residents of East Alton, Madison County, Illinois.

2. Defendant, Putnam International Equity Fund ("Putnam International Funds"), is a Massachusetts business trust with its principal place of business in Boston, Massachusetts. Putnam International Fund is the registrant of the Putnam International Growth Fund ("Putnam International Equity Fund"), which is now known as the Putnam International Equity Fund. Defendant Putnam International Fund does business in the state of Illinois and is registered as a mutual fund in the State of Illinois. Defendant, Putnam International Fund, has consented to

the jurisdiction of Illinois courts. Defendant Putnam International Fund at all times relevant herein has promoted, marketed, and sold shares to the investing public nationwide including the state of Illinois. Defendant Putnam International Fund maintains investor relationships nationwide including with shareholders in the state of Illinois. Defendant Putnam International Fund has significant contacts with Madison County and the activities complained of herein occurred, in whole or part, in Madison County, Illinois.

3. Defendant, Putnam Investment Management, LLC ("Putnam Fund Manager") is a Delaware limited liability company with its principal place of business in Boston, Massachusetts. The day-to-day tasks associated with running the business of Putnam International Equity Fund, such as investment management, share marketing, distribution, redemption, financial and regulatory reporting, and custodianship of funds are contracted out since it has no significant number of internal employees. Defendant Putnam Fund Manager has been contracted to serve as the investment manager for the Putnam International Equity Fund. As the investment manager for Putnam International Equity Fund, Defendant Putnam Fund Manager selects the fund's investments and operates or supervises most phases of the fund's business including the valuing of the fund's portfolio securities and the fund net asset value. Defendant Putnam Fund Manager has significant contacts with fund shareholders in Madison County as a result of its operation and supervision of Putnam International Equity Fund business and the activities complained of herein occurred, in whole or in part, in Madison County, Illinois. Defendant Putnam Fund Manager utilizes an interactive web site to communicate with fund shareholders, including those in Madison County, Illinois regarding the performance of the Fund and the investments it manages.

4. At all times relevant herein, Plaintiffs, Steve and Beth Dudley, have owned and held shares in the Putnam

International Equity Fund for the purpose of long term investing in international securities.

5. This Court has jurisdiction over the subject matter and the parties pursuant to 735 ILCS 5/2-209.

6. Venue is proper in this Court pursuant to 735 ILCS 5/2-101.

7. The foreign securities purchased by Defendants' fund for its portfolio are principally traded in securities markets outside of the United States.

8. Open end mutual funds such as Defendants' fund have been tremendously successful in convincing investors such as Plaintiffs to hold their fund shares by urging investors to invest for the long term and by effectively marketing the various advantages of long term ownership of funds over direct investment including professional management, diversification, and liquidity.

9. Shares of open end mutual funds are sold to investors such as Plaintiffs at a price based upon the net asset value ("NAV") per share plus applicable sales charges. Investors in shares may redeem their shares at the NAV of the shares less any redemption charges.

10. The share prices (NAV) of Defendants' mutual funds are set by deducting the fund liabilities from the total assets of the portfolio and then dividing by the number of outstanding shares.

11. Because the sales and redemption prices are based upon NAV, which in turn depends upon the fluctuating value of the fund's underlying portfolio of securities, Defendants recalculate the fund net asset value every business day. Defendants set the fund share price (NAV) once every business day at the close of trading on the New York Stock Exchange at 4:00 p.m. Eastern Time. The NAV of the shares is reported by Defendants to the National Association of Securities Dealers (NASD) for public distribution.

12. In valuing its underlying assets for purposes of setting the NAV, Defendants use the last trade price in the

home market of each of the securities in its portfolio. A significant portion of the securities in the Defendants' fund portfolio are foreign securities. The home markets for such foreign securities include London, Paris, Frankfurt, Moscow, Singapore, Kuala Lumpur, Hong Kong, Taipei, Tokyo and Sydney. These markets are located in time zones that are five hours to fifteen hours ahead of Eastern Standard Time.

13. Studies of world financial markets have established associations between the value changes among various markets. There is a positive correlation between value movements in the United States market and value movements in foreign markets. If the United States market experiences an upward movement in values, it can be predicted that Asian markets will move upward once trading begins their next day. The same upward movement can be predicted for European markets once trading begins their next day. Similarly, if the United States market experiences a downward movement in values, it can be predicted that Asian and European markets will move downward once trading begins their next day. Because of these positive correlations, the closing prices of the foreign securities in the underlying portfolio may not reflect current market values at the time Defendants set their fund NAV. Appropriate adjustments need to be made to the closing prices of the foreign securities in order to reflect current market values. Despite knowledge of the United States market result, continuous trading of the world equity indexes, ADRs, foreign currency futures markets and the correlations between the value of the fund's securities and these benchmarks, Defendants do not make any value adjustment to the portfolio's foreign securities prior to calculating fund NAV and setting share price every business day.

14. The positive correlation between the upward or downward movement of value in the United States market and subsequent movements in foreign markets around the world is between 0.7 and 0.8. A value of 0.0 equates to absolutely no correlation between value movements in United States markets and subsequent movements in for-

eign markets. A value of 1.0 equates to an absolute correlation between value movements in United States markets and subsequent value movements in foreign markets.

15. Studies of world financial markets demonstrate that the greater the percentage increase or decrease in the value of United States markets, the more likely foreign markets will post corresponding value movements on subsequent days. The probability that the value movements of foreign markets will follow the previous day's value movements in United States markets is directly correlated with the degree or extent of the value movement of United States markets.

16. Because many of the home markets for the foreign securities in the Defendants' asset portfolio last traded hours before the setting at 4:00 p.m. Eastern of the fund NAV, the closing prices used to calculate the NAV of Defendants' fund are stale and do not reflect price relevant information available subsequent to the foreign securities' last trades that will affect the value of such securities.

17. During the interval that elapses between the time that Defendants set the share NAV (and release it to the NASD for communication to the public) on consecutive days, the securities markets in Australia, Japan, Taiwan, Hong Kong, Malaysia, Singapore, Russia, Germany, France and the United Kingdom have traded for an entire session from open to close.

18. The exchange located in Sydney, Australia observes normal market trading hours of 10:00 a.m. to 4:00 p.m. local time. Active trading of securities traded on this exchange ends, and closing prices for those securities are posted, at 4:00 p.m. local time (2:00 a.m. Eastern time). When Defendants calculate their fund NAV using closing prices from this exchange, Defendants rely upon closing prices for securities traded on this exchange that have been static for 14 hours.

19 The exchange located in Tokyo, Japan observes normal trading hours of 9:00 a.m. to 3:00 p.m. local time. Active trading of securities traded on this exchange ends,

and closing prices for those securities are posted, at 3:00 p.m. local time (2:00 a.m. Eastern time). When Defendants calculate their fund NAV using closing prices from this exchange, Defendants rely upon closing prices for securities traded on this exchange that have been static for 14 hours.

20. The exchange located in Taipei, Taiwan observes normal trading hours of 9:00 a.m. to 1:30 p.m. local time. Active trading of securities traded on this exchange ends, and closing prices for those securities are posted, at 1:30 p.m. local time (1:30 a.m. Eastern time). When Defendants calculate their fund NAV using closing prices from this exchange, Defendants rely upon closing prices for securities traded on this exchange that have been static for 14.5 hours.

21. The exchange located in Hong Kong observes normal trading hours of 10:00 a.m. to 4:00 p.m. local time. Active trading of securities traded on this exchange ends, and closing prices for those securities are posted, at 4:00 p.m. local time (4:00 a.m. Eastern time). When Defendants calculate their fund NAV using closing prices from this exchange, Defendants rely upon closing prices for securities traded on this exchange that have been static for 12 hours.

22. The exchange located in Kuala Lumpur, Malaysia observes normal trading hours of 9:30 a.m. to 5:00 p.m. local time. Active trading of securities traded on this exchange ends, and closing prices for those securities are posted, at 5:00 p.m. local time (5:00 a.m. Eastern time). When Defendants calculate their fund NAV using closing prices from this exchange, Defendants rely upon closing prices for securities traded on this exchange that have been static for 11 hours.

23. The exchange located in Singapore observes normal trading hours of 9:00 a.m. to 5:00 p.m. local time. Active trading of securities traded on this exchange ends, and closing prices for those securities are posted, at 5:00 p.m. local time (5:00 a.m. Eastern time). When Defendants cal-

culate their fund NAV using closing prices from this exchange, Defendants rely upon closing prices for securities traded on this exchange that have been static for 11 hours.

24. The exchange located in Moscow, Russia observes normal trading hours of 12:00 p.m. to 7:00 p.m. local time. Active trading of securities traded on this exchange ends, and closing prices for those securities are posted, at 7:00 p.m. local time (11:00 a.m. Eastern time). When Defendants calculate their fund NAV using closing prices from this exchange, Defendants rely upon closing prices for securities traded on this exchange that have been static for 5 hours.

25. The exchange located in Frankfurt, Germany observes normal trading hours of 9:00 a.m. to 8:00 p.m. local time. Active trading of securities traded on this exchange ends, and closing prices for those securities are posted, at 8:00 p.m. local time (2:00 p.m. Eastern time). When Defendants calculate their fund NAV using closing prices from this exchange, Defendants rely upon closing prices for securities traded on this exchange that have been static for 2 hours.

26. The exchange located in Paris, France observes normal trading hours of 9:00 a.m. to 5:30 p.m. local time. Active trading of securities traded on this exchange ends, and closing prices for those securities are posted at, 5:30 p.m. local time (11:30 a.m. Eastern time). When Defendants calculate their fund NAV, using closing prices from this exchange Defendants rely upon closing prices for securities traded on this exchange that have been static for 4.5 hours.

27. The exchange located in London, England observes normal market hours of 8:00 a.m. to 4:30 p.m. local time. Active trading of securities traded on this exchange ends, and closing prices for those securities are posted at 4:30 p.m. local time (11:30 a.m. Eastern time). When Defendants calculate their fund NAV using closing prices from this exchange, Defendants rely upon closing prices for se-

curities traded on this exchange that have been static for 4.5 hours.

28. A significant portion of the underlying foreign securities in the Defendants' fund portfolio are listed on foreign exchanges and trade during each market's respective session. The NAVs set by Defendants do not take into account on a daily basis any price relevant information that has become available in this two to fourteen and one/half hour interval, after the final prices for the underlying foreign securities have been posted but, prior to the setting of the NAVs. Price relevant information, such as the continuous trading of world equity market indexes, ADRs, and foreign currency futures impacts the valuation of these underlying foreign securities and is significant for valuation because the final market prices have become stale and do not reflect the current market value of the securities.

29. By failing to make daily adjustments based upon positive correlations between upward or downward movements in United States and foreign markets and by choosing to use stale prices in valuing their fund shares and setting their daily NAVs, Defendants have exposed long term shareholders to market timing traders who regularly purchase and redeem Defendants' shares as part of a profitable trading strategy. The market timing trading strategy stems from the ability of market timing traders to predict changes in the NAV. Market timing traders are able to predict changes in the NAV because of the positive correlations between value movements in United States markets and foreign markets. The stale price strategy of market timers who trade Defendants' fund shares is to buy shares on days when the United States market moves up and to sell (redeem) shares when the United States market moves down. In order to derive maximum benefit from price relevant information developed subsequent to the now stale closing prices of the portfolio securities, market timers wait until the fund deadline for buying or selling (redeeming) shares in Defendants' funds on any particular

business day. Because Defendants cannot buy or sell the foreign securities in the fund's underlying portfolio (due to the time difference between New York and the home markets of the foreign securities) at the time it sets the daily NAV that values the shares it issues and redeems, the shares that Defendants issue to and redeem from market timers do not reflect current market prices of the foreign securities held by the fund.

30. Due to the use of stale prices by Defendants in valuing the fund shares, market timers who buy Defendants' fund shares on days when the United States market moves up are buying discounted shares at the expense of other fund shareholders because the funds underlying foreign securities assets are undervalued as of the time of the share purchase.

31. Due to the use of stale prices by Defendants in valuing their fund shares, market timers who sell (redeem) Defendants' fund shares on days when the United States market moves down are selling (redeeming) shares at a premium at the expense of other fund shareholders because the underlying foreign securities assets are overvalued as of the time of the share sale (redemption).

32. Shares in Defendants' fund can be traded, either by purchase or redemption, only once a day at 4:00 p.m. Eastern Time.

33. The excess profits that are obtained by market timing traders' taking advantage of the stale pricing of Defendants' fund shares come at the expense of fellow shareholders who are non-trading long term buy and hold investors. The transfer of wealth from the non-trading long term buy and hold shareholders to the market timers trading Defendants' fund shares occurs through dilution.

34. Market timing traders pay cash to Defendants' fund when they purchase discounted shares. Market timing traders receive cash from Defendants' fund when they sell (redeem) their shares at a premium. Defendants' fund NAV is diluted in both instances. When market timing

traders are able to buy shares at a discount, Defendants' fund assets suffer dilution because the cash received by the fund for each of the shares purchased is less than the per share value of the underlying foreign securities due to the stale pricing method utilized by Defendants. Likewise, when market timing traders are able to sell (redeem) shares at a premium, Defendants' fund assets suffer dilution because the cash paid out by the fund for each of the shares redeemed is more than the per share value of the underlying securities, again due to the stale pricing method utilized by Defendants. In both instances, when Defendants receive less cash when issuing and pay out more cash when redeeming market timing trader shares than supported by the value of their underlying foreign securities, the result is a dilution of Defendants' fund's cash. Since the cash held by the fund is one of the assets that is valued in setting the Defendants' daily fund NAV, it follows that the diluted fund cash position causes the fund NAV to be diluted as well. Due to the stale pricing utilized by Defendants, long term buy and hold shareholders have incurred a dilution in the NAV of their shares and the wealth represented by that diluted amount has been transferred to market timing traders.

35. By failing to make daily adjustments based upon positive correlations between upward movements in United States and foreign markets, world equity index market trading, ADRs, and foreign currency futures and by choosing to use stale prices in valuing the underlying foreign securities that are used setting their daily NAV, Defendants give market timing traders the opportunity to earn vastly higher returns at no additional risk. Unlike other market timing based trading, market timers who trade Defendants' shares do not have to look into the future to time their purchases and redemptions of shares, rather, they have the luxury of being able to look backwards because Defendants' share pricing fails to adjust for recognized positive correlations and uses stale prices in valuing its underlying portfolio securities.

36. Since it is such an attractive low risk trading vehicle to market timers, Defendants' fund experiences increased trading and transaction costs, disruption of planned investment strategies, forced and unplanned portfolio turnover including the liquidation of investments to meet market timer redemption requests, lost opportunity costs and asset swings that negatively impact fund operations, performance and the ability of the fund to provide a maximized return to long term shareholders.

37. Plaintiffs bring this complaint as a class action against Defendants Putnam International Equity Fund and Putnam Investment Management, LLC, and pursuant to § 5/2-801 et seq., of the Illinois Code of Civil Procedure individually and on behalf of a class of all persons in the United States who have held shares of Putnam International Equity Fund for more than fourteen days from the date of purchase to the date of sale (redemption) or exchange ("long term shareholders"). The class period commences five years prior to the filing of this complaint through the date of filing. Excluded from the class are Defendants, any parent, subsidiary, affiliate, or controlled person of Defendants, as well as the officers, directors, agents, servants or employees of Defendants, and the immediate family members of any such person. Also excluded is any judge who may preside over this case.

38. Plaintiffs are members of the class and will fairly and adequately assert and protect the interests of the class. The interest of the Plaintiffs is coincident with, and not antagonistic to, those of other members of the class. Plaintiffs have retained attorneys who are experienced in class action litigation.

39. Members of the class are so numerous that joinder of all members is impracticable.

40. Common questions of law or fact predominate over any questions affecting only individual members of the Class. Common questions include, but are not limited to, the following:

a. whether defendants failed to properly evaluate on a daily basis whether a significant event affecting the value of Putnam International Equity Fund's portfolio of securities had occurred after the foreign home markets for such securities had closed but before the fund's NAV calculation and share price setting;

b. whether defendants failed to properly implement Putnam International Equity Fund's portfolio valuation and share pricing policies and procedures making daily adjustments based upon United States market results and recognized positive correlations between upward movements in United States and foreign markets in the valuation of the fund's portfolio securities prior to the calculation of the fund NAV and setting of the share price;

c. whether defendants failed to properly implement Putnam International Equity Fund's portfolio valuation and share pricing policies and procedures making daily adjustments to stale closing prices of the underlying portfolio securities before the fund's NAV calculation and share price setting;

d. whether defendants failed to properly implement Putnam International Equity Fund's portfolio valuation and share pricing policies so as to require the use of fair value pricing on a daily basis to value portfolio securities and fund NAV and share prices when closing prices of portfolio securities did not reflect their market values;

e. whether defendants failed to protect Putnam International Equity Fund's long term shareholders from market timing traders using fund shares as a trading vehicle to earn profits at the expense of long term shareholders because of the failure of defendants to make daily adjustments, based upon known United States market results and recognized positive correlations between upward move-

ments in United States and foreign markets, prior to the daily calculation of the fund NAV and the setting of share prices as well as their use of stale prices in the valuation of the fund's portfolio securities prior to the daily calculation of the fund NAV and the setting of share prices;

f. whether defendants breached the duties they owed to plaintiffs and the class;

g. whether plaintiffs and the class have been damaged and, if so,

h. the extent of such damages.

41. The prosecution of separate actions by individual members of the Class would create a risk of:

a. inconsistent or varying adjudications with respect to individual members of the class; and

b. adjudication with respect to individual members of the class, which would, as a practical matter, be dispositive of the interests of other members not parties to the adjudication or substantially impair or impede their ability to protect their interest.

42. The class action method is appropriate for the fair and efficient prosecution of this action.

43. Individual litigation of all claims, which might be brought by all class members, would produce a multiplicity of cases so that the judicial system would be congested for years. Class treatment, by contrast, provides manageable judicial treatment calculated to bring a rapid conclusion to all litigation of all claims arising from the conduct of the defendants.

COUNT I

Plaintiffs, Steve and Beth Dudley, individually and on behalf of all others similarly situated, by and through their undersigned counsel, and for Count I of their Com-

plaint against Defendants Putnam International Fund and Putnam Fund Manager, state as follows:

44. Plaintiffs repeat and incorporate by reference paragraphs 1 through 43 as if fully set forth herein.

45. Defendant Putnam International Fund operates Putnam International Equity Fund as an open end mutual fund with the stated goal of providing long term capital growth to investors who hold shares of the fund. The fund expressly states in its prospectus that it seeks to achieve its investment goal through a policy of investing in stocks and debt obligations of companies outside of the United States.

46. Defendant Putnam Fund Manager serves as the investment manager for Putnam International Equity Fund. Defendant Putnam Fund Manager provides, among other things, portfolio management services and selects the securities for Putnam International Equity Fund to buy, hold or sell. Putnam International Equity Fund pays Defendant Putnam Fund Manager set fees based on the percentage of assets under management for managing Putnam International Equity Fund's assets. Defendant Putnam Fund Manager's compensation and management of the Putnam International Equity Fund are required to be reviewed and approved by Defendant Putnam International Funds' board of trustees.

47. At all times relevant hereto, Plaintiffs Steve and Beth Dudley have owned shares in Putnam International Equity Fund.

48. At all times relevant herein, Defendants had a duty when valuing the fund's securities and determining daily NAV to utilize accurate current market values for such securities in order to avoid dilution in the value of long term shareholders' holdings.

49. Defendants breached their duties of due care owed to Plaintiffs Steve and Beth Dudley and similarly situated

shareholders of the Putnam International Equity Fund by, inter alia:

a. failing to properly evaluate on a daily basis whether a significant event affecting the value of Putnam International Equity Fund's portfolio of securities had occurred after the foreign trading markets for such securities had closed but before Defendants calculated NAV and share prices;

b. failing to implement Putnam International Equity Fund's portfolio valuation and share pricing policies and procedures; and

c. allowing portfolio valuation and share pricing policies and procedures which benefited market timing traders of Putnam International Equity Fund's shares at the expense of long term shareholders.

50. As a direct and proximate result of the Defendants' breach of their duties, Plaintiffs Steve and Beth Dudley and the class have suffered damages in the amount to be proven at trial, but less than $75,000 per plaintiff or class member, including all compensatory damages, attorneys' fees and costs.

WHEREFORE, Plaintiffs and the Class pray that the Court enter judgment in their favor and against Putnam International Equity Fund and Putnam Investment Management, LLC, as follows:

A. Ordering that this action be maintained as a class action pursuant to 735 ILCS 5/2 801 and the following class be certified:

> All persons in the United States who held shares in the Putnam International Equity Fund for a period of more than fourteen days before redeeming or exchanging them during the period beginning from five years prior to and through the date of the filing of this complaint;

B. Awarding Plaintiffs and the Class compensatory damages, prejudgment interest, costs of suits, and attor-

neys' fees for an amount representing the damages caused by Defendants' breach of their duties not to exceed $75,000 per plaintiff or class member.

PLAINTIFFS DEMAND TRIAL BY JURY

COUNT II

Plaintiffs, Steve and Beth Dudley, individually and on behalf of all others similarly situated, by and through their undersigned counsel, and for Count II of their Complaint against Defendants Putnam International Fund and Putnam Fund Manager, state as follows:

51. Plaintiffs repeat and incorporate by reference paragraphs 1 through 48 as if fully set forth herein.

52. On or about January 1, 1965, applicable published regulations expressly recognized that changes in trading prices of securities in the Putnam International Equity Fund might occur daily after the closing of the New York Stock Exchange.

53. Defendants knew, or were negligent in not knowing, that the closing prices for the foreign securities held by the Putnam International Equity Fund and used by Defendants to calculate NAV for said Fund did not represent current market value because, inter alia, those prices did not reflect changes in the fund's securities which occurred after the exchange on which those foreign securities trade closed and before defendants calculated NAV and share price.

54. With utter indifference and conscious disregard for Plaintiffs Steve and Beth Dudley's investment and the investments of similarly situated fund shareholders, Defendants willfully and wantonly breached their duties to Plaintiffs Steve and Beth Dudley and similarly situated shareholders by, inter alia:

a. failing to know and implement applicable rules and regulations concerning the calculation of NAV;

b. failing to properly evaluate on a daily basis whether a significant event affecting the value of Putnam International Equity Fund's portfolio of securities had occurred after the foreign trading markets for such securities had closed but before Defendants calculated NAV and share prices;

c. failing to implement Putnam International Equity Fund's portfolio valuation and share pricing policies and procedures; and

d. allowing portfolio valuation and share pricing policies and procedures which benefited market timing traders of Putnam International Equity Fund's shares at the expense of long term shareholders.

55. As a direct and proximate result of the Defendants' breach of their duties, Plaintiffs Steve and Beth Dudley and the class have suffered damages in the amount to be proven at trial, but less than $75,000 per plaintiff or class member, including all compensatory damages, punitive damages, attorneys' fees and costs.

WHEREFORE, Plaintiffs and the Class pray that the Court enter judgment in their favor and against Putnam International Fund and Putnam Investment Management, LLC, as follows:

A. Ordering that this action be maintained as a class action pursuant to 735 ILCS 5/2 801 and the following class be certified:

> All persons in the United States who held shares in the Putnam International Equity Fund for a period of more than fourteen days before redeeming or exchanging them during the period beginning from five years prior to and through the date of the filing of this complaint;

B. Awarding Plaintiffs and the Class compensatory damages, prejudgment interest, costs of suits, punitive damages and attorneys' fees for an amount representing

the damages caused by Defendants' breach of their duties not to exceed $75,000 per plaintiff or class member.

PLAINTIFFS DEMAND TRIAL BY JURY

[attorney name and address blocks omitted]

IN THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

Cause No. 03-L-1540

STEVE AND BETH DUDLEY,
INDIVIDUALLY AND ON BEHALF OF ALL OTHERS
SIMILARLY SITUATED,
Plaintiffs,

v.

PUTNAM INVESTMENT FUNDS AND
PUTNAM INVESTMENT MANAGEMENT, LLC,
Defendants.

[Filed Nov. 10, 2003]

COMPLAINT

Plaintiffs, Steve and Beth Dudley, individually and on behalf of all others similarly situated, by and through their undersigned counsel, and for their complaint against Defendants Putnam Investment Funds and Putnam Investment Management, LLC, state as follows:

1. Plaintiffs, Steve and Beth Dudley, are residents of East Alton, Madison County, Illinois.

2. Defendant, Putnam Investment Funds ("Putnam Funds"), is a Massachusetts business trust with its principal place of business in Boston, Massachusetts. Putnam Funds is the registrant of the Putnam International New Opportunities Fund ("Putnam International New Opportunities Fund"). Defendant Putnam Funds does business in the state of Illinois and is registered as a mutual fund in the State of Illinois. Defendant, Putnam Funds, has consented to the jurisdiction of Illinois courts. Defendant Putnam Funds at all times relevant herein has promoted,

marketed, and sold shares to the investing public nationwide including the state of Illinois. Defendant Putnam Funds maintains investor relationships nationwide including with shareholders in the state of Illinois. Defendant Putnam Funds has significant contacts with Madison County and the activities complained of herein occurred, in whole or part, in Madison County, Illinois.

3. Defendant, Putnam Investment Management, LLC ("Putnam Fund Manager") is a Delaware Limited Liability Company with its principal place of business in Boston, Massachusetts. The day-to-day tasks associated with running the business of Putnam International New Opportunities Fund, such as investment management, share marketing, distribution, redemption, financial and regulatory reporting, and custodianship of funds are contracted out since it has no significant number of internal employees. Defendant Putnam Fund Manager has been contracted to serve as the investment manager for the Putnam International New Opportunities Fund. As the investment manager for Putnam International New Opportunities Fund, Defendant Putnam Fund Manager selects the fund's investments and operates or supervises most phases of the fund's business including the valuing of the fund's portfolio securities and the fund net asset value. Defendant Putnam Fund Manager has significant contacts with fund shareholders in Madison County as a result of its operation and supervision of Putnam International New Opportunities Fund business and the activities complained of herein occurred, in whole or in part, in Madison County, Illinois. Defendant Putnam Fund Manager utilizes an interactive web site to communicate with fund shareholders, including those in Madison County, Illinois regarding the performance of the Fund and the investments it manages.

4. At all times relevant herein, Plaintiffs, Steve and Beth Dudley, have owned and held shares in the Putnam International New Opportunities Fund for the purpose of long term investing in international securities.

5. This Court has jurisdiction over the subject matter and the parties pursuant to 735 ILCS 5/2-209.

6. Venue is proper in this Court pursuant to 735 ILCS 5/2-101.

7. The foreign securities purchased by Defendants' fund for its portfolio are principally traded in securities markets outside of the United States.

8. Open end mutual funds such as Defendants' fund have been tremendously successful in convincing investors such as Plaintiffs to hold their fund shares by urging investors to invest for the long term and by effectively marketing the various advantages of long term ownership of funds over direct investment including professional management, diversification, and liquidity.

9. Shares of open end mutual funds are sold to investors such as Plaintiffs at a price based upon the net asset value ("NAV") per share plus applicable sales charges. Investors in shares may redeem their shares at the NAV of the shares less any redemption charges.

10. The share prices (NAV) of Defendants' mutual funds are set by deducting the fund liabilities from the total assets of the portfolio and then dividing by the number of outstanding shares.

11. Because the sales and redemption prices are based upon NAV, which in turn depends upon the fluctuating value of the fund's underlying portfolio of securities, Defendants recalculate the fund net asset value every business day. Defendants set the fund share price (NAV) once every business day at the close of trading on the New York Stock Exchange at 4:00 p.m. Eastern Time. The NAV of the shares is reported by Defendants to the National Association of Securities Dealers (NASD) for public distribution.

12. In valuing the fund's underlying assets for purposes of setting the NAV, Defendants use the last trade price in the home market of each of the securities in its portfolio. A significant portion of the securities in the De-

fendants' fund's portfolio are foreign securities. The home markets for such foreign securities include London, Paris, Frankfurt, Moscow, Singapore, Kuala Lumpur, Hong Kong, Taipei, Tokyo and Sydney. These markets are located in time zones that are five hours to fifteen hours ahead of Eastern Standard Time.

13. Studies of world financial markets have established associations between the value changes among various markets. There is a positive correlation between value movements in the United States market and value movements in foreign markets. If the United States market experiences an upward movement in values, it can be predicted that Asian markets will move upward once trading begins their next day. The same upward movement can be predicted for European markets once trading begins their next day. Similarly, if the United States market experiences a downward movement in values, it can be predicted that Asian and European markets will move downward once trading begins their next day. Because of these positive correlations, the closing prices of the foreign securities in the underlying portfolio may not reflect current market values at the time Defendants set their fund NAV. Appropriate adjustments need to be made to the closing prices of the foreign securities in order to reflect current market values. Despite knowledge of the United States market result, continuous trading of the world equity indexes, ADRs, and foreign currency futures markets and the correlations between the value of the fund's securities and these benchmarks, Defendants do not make any value adjustment to the portfolio's foreign securities prior to calculating fund NAV and setting share price every business day.

14. The positive correlation between the upward or downward movement of value in the United States market and subsequent movements in foreign markets around the world is between 0.7 and 0.8. A value of 0.0 equates to absolutely no correlation between value movements in United States markets and subsequent movements in foreign markets. A value of 1.0 equates to an absolute corre-

lation between value movements in United States markets and subsequent value movements in foreign markets.

15. Studies of world financial markets demonstrate that the greater the percentage increase or decrease in the value of United States markets, the more likely foreign markets will post corresponding value movements on subsequent days. The probability that the value movements of foreign markets will follow the previous day's value movements in United States markets is directly correlated with the degree or extent of the value movement of United States markets.

16. Because many of the home markets for the foreign securities in the Defendants' asset portfolio last traded hours before the setting at 4:00 p.m. Eastern of the fund NAV, the closing prices used to calculate the NAV of Defendants' funds are stale and do not reflect price relevant information available subsequent to the foreign securities' last trade that will affect the value of such security.

17. During the interval that elapses between the time that Defendants set their share NAV (and release it to the NASD for communication to the public) on consecutive days, the securities markets in Australia, Japan, Taiwan, Hong Kong, Malaysia, Singapore, Russia, Germany, France and the United Kingdom have traded for an entire session from open to close.

18. The exchange located in Sydney, Australia observes normal market trading hours of 10:00 a.m. to 4:00 p.m. local time. Active trading of securities traded on this exchange ends, and closing prices for those securities are posted, at 4:00 p.m. local time (2:00 a.m. Eastern time). When Defendants calculate their fund NAV using closing prices from this exchange, Defendants rely upon closing prices for securities traded on this exchange that have been static for 14 hours.

19. The exchange located in Tokyo, Japan observes normal trading hours of 9:00 a.m. to 3:00 p.m. local time. Active trading of securities traded on this exchange ends, and closing prices for those securities are posted, at 3:00

p.m. local time (2:00 a.m. Eastern time). When Defendants calculate their fund NAV using closing prices from this exchange, Defendants rely upon closing prices for securities traded on this exchange that have been static for 14 hours.

20. The exchange located in Taipei, Taiwan observes normal trading hours of 9:00 a.m. to 1:30 p.m. local time. Active trading of securities traded on this exchange ends, and closing prices for those securities are posted, at 1:30 p.m. local time (1:30 a.m. Eastern time). When Defendants calculate their fund NAV using closing prices from this exchange, Defendants rely upon closing prices for securities traded on this exchange that have been static for 14.5 hours.

21. The exchange located in Hong Kong observes normal trading hours of 10:00 a.m. to 4:00 p.m. local time. Active trading of securities traded on this exchange ends, and closing prices for those securities are posted, at 4:00 p.m. local time (4:00 a.m. Eastern time). When Defendants calculate their fund NAV using closing prices from this exchange, Defendants rely upon closing prices for securities traded on this exchange that have been static for 12 hours.

22. The exchange located in Kuala Lumpur, Malaysia observes normal trading hours of 9:30 a.m. to 5:00 p.m. local time. Active trading of securities traded on this exchange ends, and closing prices for those securities are posted, at 5:00 p.m. local time (5:00 a.m. Eastern time). When Defendants calculate their fund NAV using closing prices from this exchange, Defendants rely upon closing prices for securities traded on this exchange that have been static for 11 hours.

23. The exchange located in Singapore observes normal trading hours of 9:00 a.m. to 5:00 p.m. local time. Active trading of securities traded on this exchange ends, and closing prices for those securities are posted, at 5:00 p.m. local time (5:00 a.m. Eastern time). When Defendants calculate their fund NAV using closing prices from this ex-

change, Defendants rely upon closing prices for securities traded on this exchange that have been static for 11 hours.

24. The exchange located in Moscow, Russia observes normal trading hours of 12:00 p.m. to 7:00 p.m. local time. Active trading of securities traded on this exchange ends, and closing prices for those securities are posted, at 7:00 p.m. local time (11:00 a.m. Eastern time). When Defendants calculate their fund NAV using closing prices from this exchange, Defendants rely upon closing prices for securities traded on this exchange that have been static for 5 hours.

25. The exchange located in Frankfurt, Germany observes normal trading hours of 9:00 a.m. to 8:00 p.m. local time. Active trading of securities traded on this exchange ends, and closing prices for those securities are posted, at 8:00 p.m. local time (2:00 p.m. Eastern time). When Defendants calculate their fund NAV using closing prices from this exchange, Defendants rely upon closing prices for securities traded on this exchange that have been static for 2 hours.

26. The exchange located in Paris, France observes normal trading hours of 9:00 a.m. to 5:30 p.m. local time. Active trading of securities traded on this exchange ends, and closing prices for those securities are posted at, 5:30 p.m. local time (11:30 a.m. Eastern time). When Defendants calculate their fund NAV, using closing prices from this exchange Defendants rely upon closing prices for securities traded on this exchange that have been static for 4.5 hours.

27. The exchange located in London, England observes normal market hours of 8:00 a.m. to 4:30 p.m. local time. Active trading of securities traded on this exchange ends, and closing prices for those securities are posted at 4:30 p.m. local time (11:30 a.m. Eastern time). When Defendants calculate their fund NAV using closing prices from this exchange, Defendants rely upon closing prices for securities traded on this exchange that have been static for 4.5 hours.

28. A significant portion of the underlying foreign securities in the Defendants' fund portfolio are listed on foreign exchanges and trade during each market's respective session. The NAVs set by Defendants do not take into account on a daily basis any price relevant information that has become available in this two to fourteen and one/half hour interval, after the final prices for the underlying foreign securities have been posted but, prior to the setting of the NAVs. Price relevant information, such as the continuous trading of world equity market indexes, ADRs, and foreign currency futures impacts the valuation of these underlying foreign securities and is significant for valuation because the final market prices have become stale and do not reflect the current market value of the securities.

29. By failing to make daily adjustments based upon positive correlations between upward or downward movements in United States and foreign markets and by choosing to use stale prices in valuing their fund shares and setting their daily NAVs, Defendants have exposed long term shareholders to market timing traders who regularly purchase and redeem Defendants' shares as part of a profitable trading strategy. The market timing trading strategy stems from the ability of market timing traders to predict changes in the NAV. Market timing traders are able to predict changes in the NAV because of the positive correlations between value movements in United States markets and foreign markets. The stale price strategy of market timers who trade Defendants' shares is to buy shares on days when the United States market moves up and to sell (redeem) shares when the United States market moves down. In order to derive maximum benefit from price relevant information developed subsequent to the now stale closing prices of the portfolio securities, market timers wait until the fund deadline for buying or selling (redeeming) shares in Defendants' funds on any particular business day. Because Defendants cannot buy or sell the foreign securities in the fund's underlying portfolio (due to the time difference between New York and the home mar-

kets of the foreign securities) at the time it sets the daily NAV that values the shares it issues and redeems, the shares that Defendants issue to and redeem from market timers do not reflect current market prices of the foreign securities held by the fund.

30. Due to the use of stale prices by Defendants in valuing the fund shares, market timers who buy Defendants' fund shares on days when the United States market moves up are buying discounted shares at the expense of other fund shareholders because the funds underlying foreign securities assets are undervalued as of the time of the share purchase.

31. Due to the use of stale prices by Defendants in valuing their fund shares, market timers who sell (redeem) Defendants' fund shares on days when the United States market moves down are selling (redeeming) shares at a premium at the expense of other fund shareholders because the underlying foreign securities assets are overvalued as of the time of the share sale (redemption).

32. Shares in Defendants' fund can be traded, either by purchase or redemption, only once a day at 4:00 p.m. Eastern Time.

33. The excess profits that are obtained by market timing traders' taking advantage of the stale pricing of Defendants' fund shares come at the expense of fellow shareholders who are non-trading long term buy and hold investors. The transfer of wealth from the non-trading long term buy and hold shareholders to the market timers trading Defendants' fund shares occurs through dilution.

34. Market timing traders pay cash to Defendants' fund when they purchase discounted shares. Market timing traders receive cash from Defendants' fund when they sell (redeem) their shares at a premium. Defendants' fund NAV is diluted in both instances. When market timing traders are able to buy shares at a discount, Defendants' fund assets suffer dilution because the cash received by the fund for each of the shares purchased is less than the

per share value of the underlying foreign securities because of the stale pricing method utilized by Defendants. Likewise, when market timing traders are able to sell (redeem) shares at a premium, Defendants' fund assets suffer dilution because the cash paid out by the fund for the shares redeemed is more than the per share value of the underlying securities, again due to the stale pricing utilized by Defendants. In both instances, when Defendants receive less cash when issuing and pay out more cash when redeeming market timing trader shares than supported by the value of their underlying foreign securities, the result is a dilution of Defendants' cash. Since the cash held by the fund is one of the assets that is valued in setting the Defendants' daily fund NAV, it follows that the diluted fund cash position causes the fund NAV to be diluted as well. Due to the stale pricing utilized by Defendants, long term buy and hold shareholders have incurred a dilution in the NAV of their shares and the wealth represented by that diluted amount has been transferred to market timing traders.

35. By failing to make daily adjustments based upon positive correlations between upward movements in United States and foreign markets, world equity index market trading, ADRs, and foreign currency futures and by choosing to use stale prices in valuing the underlying foreign securities that are used setting their daily NAV, Defendants give market timing traders the opportunity to earn vastly higher returns at no additional risk. Unlike other market timing based trading, market timers who trade Defendants' shares do not have to look into the future to time their purchases and redemptions of shares, rather, they have the luxury of being able to look backwards because Defendants' fund share pricing fails to adjust for recognized positive correlations and uses stale prices in valuing its underlying portfolio securities.

36. Since it is such an attractive low risk trading vehicle to market timers, Defendants' funds experience increased trading and transaction costs, disruption of

planned investment strategies, forced and unplanned portfolio turnover including the liquidation of investments to meet market timer redemption requests, lost opportunity costs and asset swings that negatively impact fund operations, performance and the ability of the fund to provide a maximized return to long term shareholders.

37. Plaintiffs bring this complaint as a class action against Defendants Putnam Funds and Putnam Fund Manager, and pursuant to § 5/2-801 et seq., of the Illinois Code of Civil Procedure individually and on behalf of a class of all persons in the United States who have held shares of Putnam International New Opportunities Fund for more than fourteen days from the date of purchase to the date of sale (redemption) or exchange ("long term shareholders"). The class period commences five years prior to the filing of this complaint through the date of filing. Excluded from the class are Defendants, any parent, subsidiary, affiliate, or controlled person of Defendants, as well as the officers, directors, agents, servants or employees of Defendants, and the immediate family members of any such person. Also excluded is any judge who may preside over this case.

38. Plaintiffs are members of the class and will fairly and adequately assert and protect the interests of the class. The interests of the Plaintiffs are coincident with, and not antagonistic to, those of other members of the class. Plaintiffs have retained attorneys who are experienced in class action litigation.

39. Members of the class are so numerous that joinder of all members is impracticable.

40. Common questions of law or fact predominate over any questions affecting only individual members of the Class. Common questions include, but are not limited to, the following:

a. whether defendants failed to properly evaluate on a daily basis whether a significant event affecting the value of Putnam International New Opportunities

Fund's portfolio of securities had occurred after the foreign home markets for such securities had closed but before the fund's NAV calculation and share price setting;

b. whether defendants failed to properly implement Putnam International New Opportunities Fund's portfolio valuation and share pricing policies and procedures making daily adjustments based upon United States market results and recognized positive correlations between upward movements in United States and foreign markets in the valuation of the fund's portfolio securities prior to the calculation of the fund NAV and setting of the share price;

c. whether defendants failed to properly implement Putnam International New Opportunities Fund's portfolio valuation and share pricing policies and procedures making daily adjustments to stale closing prices of the underlying portfolio securities before the fund's NAV calculation and share price setting;

d. whether defendants failed to properly implement Putnam International New Opportunities Fund's portfolio valuation and share pricing policies so as to require the use of fair value pricing on a daily basis to value portfolio securities and fund NAV and share prices when closing prices of portfolio securities did not reflect their market values;

e. whether defendants failed to protect Putnam International New Opportunities Fund's long term shareholders from market timing traders using fund shares as a trading vehicle to earn profits at the expense of long term shareholders because of defendants' failure to make daily adjustments, based upon known United States market results and recognized positive correlations between upward movements in United States and foreign markets, prior to the daily calculation of the fund

NAV and the setting of share prices as well as their use of stale prices in the valuation of the fund's portfolio securities prior to the daily calculation of the fund NAV and the setting of share prices;

f. whether defendants breached the duties they owed to plaintiffs and the class;

g. whether plaintiffs and the class have been damaged and, if so,

h. the extent of such damages.

41. The prosecution of separate actions by individual members of the Class would create a risk of:

a. inconsistent or varying adjudications with respect to individual members of the class; and

b. adjudication with respect to individual members of the class, which would, as a practical matter, be dispositive of the interests of other members not parties to the adjudication or substantially impair or impede their ability to protect their interest.

42. The class action method is appropriate for the fair and efficient prosecution of this action.

43. Individual litigation of all claims, which might be brought by all class members, would produce a multiplicity of cases so that the judicial system would be congested for years. Class treatment, by contrast, provides manageable judicial treatment calculated to bring a rapid conclusion to all litigation of all claims arising from the conduct of the defendants.

COUNT I

Plaintiffs, Steve and Beth Dudley, individually and on behalf of all others similarly situated, by and through their undersigned counsel, and for Count I of their Complaint against Defendants Putnam Funds and Putnam Fund Manager, state as follows:

44. Plaintiffs repeat and incorporate by reference paragraphs 1 through 43 as if fully set forth herein.

45. Defendant Putnam Funds operates Putnam International New Opportunities Fund as an open end mutual fund with the stated goal of providing long term capital growth to investors who hold shares of the fund. The fund expressly states in its prospectus that it seeks to achieve its investment goal through a policy of investing in stocks and debt obligations of companies outside of the United States.

46. Defendant Putnam Fund Manager serves as the investment manager for Putnam International New Opportunities Fund. Defendant Putnam Fund Manager provides, among other things, portfolio management services and selects the securities for Putnam International New Opportunities Fund to buy, hold or sell. Putnam International New Opportunities Fund pays Defendant Putnam Fund Manager set fees based on the percentage of assets under management for managing Putnam International New Opportunities Fund's assets. Defendant Putnam Fund Manager's compensation and management of the Putnam International New Opportunities Fund are required to be reviewed and approved by Defendant Putnam Funds' board of trustees.

47. At all times relevant hereto, Plaintiffs Steve and Beth Dudley have owned shares in Putnam International New Opportunities Fund.

48. At all times relevant herein, Defendants had a duty when valuing the fund's securities and determining daily NAV to utilize accurate current market values for such securities in order to avoid dilution in the value of long term shareholders' holdings.

49. Defendants breached their duties of due care owed to Plaintiffs Steve and Beth Dudley, and similarly situated owners of the Putnam International New Opportunities Fund by, inter alia:

a. failing to properly evaluate on a daily basis whether a significant event affecting the value of Putnam International New Opportunities Fund's portfolio of securities had occurred after the foreign trading markets for such securities had closed but before Defendants calculated NAV and share prices;

b. failing to implement Putnam International New Opportunities Fund's portfolio valuation and share pricing policies and procedures; and

c. allowing portfolio valuation and share pricing policies and procedures which benefited market timing traders of Putnam International New Opportunities Fund's shares at the expense of long term shareholders.

50. As a direct and proximate result of the Defendants' breach of their duties, Plaintiffs and the class have suffered damages in the amount to be proven at trial, but less than $75,000 per plaintiff or class member, including all compensatory damages, attorneys' fees and costs.

WHEREFORE, Plaintiffs and the Class pray that the Court enter judgment in their favor and against Putnam Funds and Putnam Fund Manager, as follows:

A. Ordering that this action be maintained as a class action pursuant to 735 ILCS 5/2 801 and the following class be certified:

> All persons in the United States who held shares in the Putnam International New Opportunities Fund for a period of more than fourteen days before redeeming or exchanging them during the period beginning from five years prior to and through the date of the filing of this complaint;

B. Awarding Plaintiffs and the Class compensatory damages, prejudgment interest, costs of suits, and attorneys' fees for an amount representing the damages caused by Defendants' breach of their duties not to exceed $75,000 per plaintiff or class member.

PLAINTIFFS DEMAND TRIAL BY JURY

COUNT II

Plaintiffs, Steve and Beth Dudley, individually and on behalf of all others similarly situated, by and through their undersigned counsel, and for Count II of their Complaint against Defendants Putnam Funds and Putnam Fund Manager, state as follows:

51. Plaintiffs repeat and incorporate by reference paragraphs 1 through 48 as if fully set forth herein.

52. On or about January 1, 1965, applicable published regulations expressly recognized that changes in trading prices of securities in the Putnam International New Opportunities Fund might occur daily after the closing of the New York Stock Exchange.

53. Defendants knew, or were negligent in not knowing, that the closing prices for the foreign securities held by the Putnam International New Opportunities Fund and used by Defendants to calculate NAV for said Fund did not represent current market value because, inter alia, those prices did not reflect changes in the fund's securities which occurred after the exchange on which those foreign securities trade closed and before Defendants calculated NAV and share prices.

54. With utter indifference and conscious disregard for Plaintiffs' investment and the investments of similarly situated fund shareholders, Defendants willfully and wantonly breached their duties to Plaintiffs and similarly situated shareholders by, inter alia:

a. failing to know and implement applicable rules and regulations concerning the calculation of NAV;

b. failing to properly evaluate on a daily basis whether a significant event affecting the value of Putnam International New Opportunities Fund's portfolio of securities had occurred after the foreign trading markets for such securities had closed but before Defendants calculated NAV and share price;

c. failing to implement Putnam International New Opportunities Fund's portfolio valuation and share pricing policies and procedures; and

d. allowing portfolio valuation and share pricing policies and procedures which benefited market timing traders of Putnam International New Opportunities Fund's shares at the expense of long term shareholders.

55. As a direct and proximate result of the Defendants' breach of their duties, Plaintiffs Steve and Beth Dudley and the class have suffered damages in the amount to be proven at trial, but less than $75,000 per plaintiff or class member, including all compensatory damages, punitive damages, attorneys' fees and costs.

WHEREFORE, Plaintiffs and the Class pray that the Court enter judgment in their favor and against Putnam Funds and Putnam Fund Manager, as follows:

A. Ordering that this action be maintained as a class action pursuant to 735 ILCS 5/2-801 and the following class be certified:

> All persons in the United States who held shares in the Putnam International New Opportunities Fund for a period of more than fourteen days before redeeming or exchanging them during the period beginning from five years prior to and through the date of the filing of this complaint;

B. Awarding Plaintiffs and the Class compensatory damages, prejudgment interest, costs of suits, punitive damages and attorneys' fees for an amount representing the damages caused by Defendants' breach of their duties not to exceed $75,000 per plaintiff or class member.

PLAINTIFFS DEMAND TRIAL BY JURY

[attorney name and address blocks omitted]

IN THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

Cause No. 03-L-1550

GARY VOGELER, INDIVIDUALLY AND
ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Plaintiff,

v.

COLUMBIA ACORN TRUST AND
COLUMBIA WANGER ASSET MANAGEMENT, LP,
Defendants.

[Filed Nov. 13, 2003]

COMPLAINT

Plaintiff, Gary Vogeler, individually and on behalf of all others similarly situated, by and through his undersigned counsel, and for his complaint against Defendants, Columbia Acorn Trust and Columbia Wanger Asset Management, LP, states as follows:

1. Plaintiff, Gary Vogeler, is a resident of Godfrey, Madison County, Illinois.

2. Defendant, Columbia Acorn Trust ("Columbia Trust"), is a Massachusetts business trust with its principal place of business in Chicago, Illinois.[1] Columbia Trust is the registrant of the Columbia Acorn International Fund ("Columbia Acorn").[2] Defendant Columbia Trust does business in the state of Illinois and is registered as a mutual fund in the State of Illinois. Defendant Columbia

[1] Formerly known as "Liberty Acorn Trust."

[2] Formerly known as "Liberty Acorn International Fund."

Trust has consented to the jurisdiction of Illinois courts. Defendant Columbia Trust at all times relevant herein has promoted, marketed, and sold shares to the investing public nationwide including the state of Illinois. Defendant Columbia Trust maintains investor relationships nationwide including with shareholders in the state of Illinois. Defendant Columbia Trust has significant contacts with Madison County and the activities complained of herein occurred, in whole or part, in Madison County, Illinois.

3. Defendant, Columbia Wanger Asset Management, LP ("Columbia Fund Manager"), is a Delaware partnership with its principal place of business in Chicago, Illinois.[3] The day-to-day tasks associated with running the business of Columbia Acorn, such as investment management, share marketing, distribution, redemption, financial and regulatory reporting, and custodianship of funds are contracted out since it has no significant number of internal employees. Defendant Columbia Fund Manager has been contracted to serve as the investment manager for the Columbia Acorn. As the investment manager for Columbia Acorn, Defendant Columbia Fund Manager selects the fund's investments and operates or supervises most phases of the fund's business including the valuing of the fund's portfolio securities and the fund net asset value. Defendant Columbia Fund Manager has significant contacts with fund shareholders in Madison County as a result of its operation and supervision of Columbia Acorn business and the activities complained of herein occurred, in whole or in part, in Madison County, Illinois. Defendant Columbia Fund Manager utilizes an interactive web site to communicate with fund shareholders, including those in Madison County, Illinois regarding the performance of the Fund and the investments it manages.

4. At all times relevant herein, Plaintiff Gary Vogeler has owned and held shares in the Columbia Acorn for the purpose of long term investing in international securities.

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[3] Formerly known as "Liberty Wanger Asset Management, LP."

5. This Court has jurisdiction over the subject matter and the parties pursuant to 735 ILCS 5/2-209.

6. Venue is proper in this Court pursuant to 735 ILCS 5/2-101.

7. The foreign securities purchased by Defendants' fund for its portfolios are principally traded in securities markets outside of the United States.

8. Open end mutual funds such as Defendants' fund have been tremendously successful in convincing investors such as Plaintiff to hold their fund shares by urging investors to invest for the long term and by effectively marketing the various advantages of long term ownership of funds over direct investment including professional management, diversification, and liquidity.

9. Shares of open end mutual funds are sold to investors such as Plaintiff at a price based upon the net asset value ("NAV") per share plus applicable sales charges. Investors in shares may redeem their shares at the NAV of the shares less any redemption charges.

10. The share prices (NAV) of Defendants' mutual fund are set by deducting the fund liabilities from the total assets of the portfolio and then dividing by the number of outstanding shares.

11. Because the sales and redemption prices are based upon NAV, which in turn depends upon the fluctuating value of the fund's underlying portfolio of securities, Defendants recalculate the fund net asset value every business day. Defendants set the fund share price (NAV) once every business day at the close of trading on the New York Stock Exchange at 4:00 p.m. Eastern Time. The NAV of the shares is reported by Defendants to the National Association of Securities Dealers (NASD) for public distribution.

12. In valuing its underlying assets for purposes of setting the NAV, Defendants use the last trade price in the home market of each of the securities in its portfolio. A significant portion of the securities in the Defendants' fund

portfolio are foreign securities. The home markets for such foreign securities include London, Paris, Frankfurt, Moscow, Singapore, Kuala Lumpur, Hong Kong, Taipei, Tokyo and Sydney. These markets are located in time zones that are five hours to fifteen hours ahead of Eastern Standard Time.

13. Studies of world financial markets have established associations between the value changes among various markets. There is a positive correlation between value movements in the United States market and value movements in foreign markets. If the United States market experiences an upward movement in values, it can be predicted that Asian markets will move upward once trading begins their next day. The same upward movement can be predicted for European markets once trading begins their next day. Similarly, if the United States market experiences a downward movement in values, it can be predicted that Asian and European markets will move downward once trading begins their next day. Because of these positive correlations, the closing prices of the foreign securities in the underlying portfolio may not reflect current market values at the time Defendants set their fund NAV. Appropriate adjustments need to be made to the closing prices of the foreign securities in order to reflect current market values. Despite knowledge of the United States market result, continuous trading of the world equity indexes, ADRs, foreign currency futures markets, and the correlations between the value of the fund's securities and these benchmarks, Defendants do not make any value adjustment to the portfolio's foreign securities prior to calculating fund NAV and setting share price every business day.

14. The positive correlation between the upward or downward movement of value in the United States market and subsequent movements in foreign markets around the world is between 0.7 and 0.8. A value of 0.0 equates to absolutely no correlation between value movements in United States markets and subsequent movements in foreign markets. A value of 1.0 equates to an absolute corre-

lation between value movements in United States markets and subsequent value movements in foreign markets.

15. Studies of world financial markets demonstrate that the greater the percentage increase or decrease in the value of United States markets, the more likely foreign markets will post corresponding value movements on subsequent days. The probability that the value movements of foreign markets will follow the previous day's value movements in United States markets is directly correlated with the degree or extent of the value movement of United States markets.

16. Because many of the home markets for the foreign securities in the Defendants' asset portfolio last traded hours before the setting at 4:00 p.m. Eastern of the fund NAV, the closing prices used to calculate the NAV of Defendants' fund are stale and do not reflect price relevant information available subsequent to the foreign security's last trade that will affect the value of such security.

17. During the interval that elapses between the time that Defendants set the fund share NAV (and release it to the NASD for communication to the public) on consecutive days, the securities markets in Australia, Japan, Taiwan, Hong Kong, Malaysia, Singapore, Russia, Germany, France and the United Kingdom have traded for an entire session from open to close.

18. The exchange located in Sydney, Australia, observes normal market trading hours of 10:00 a.m. to 4:00 p.m. local time. Active trading of securities traded on this exchange ends, and closing prices for those securities are posted, at 4:00 p.m. local time (2:00 a.m. Eastern time). When Defendants calculate their fund NAV using closing prices from this exchange, Defendants rely upon closing prices for securities traded on this exchange that have been static for 14 hours.

19. The exchange located in Tokyo, Japan, observes normal trading hours of 9:00 a.m. to 3:00 p.m. local time. Active trading of securities traded on this exchange ends, and closing prices for those securities are posted, at 3:00

p.m. local time (2:00 a.m. Eastern time). When Defendants calculate their fund NAV using closing prices from this exchange, Defendants rely upon closing prices for securities traded on this exchange that have been static for 14 hours.

20. The exchange located in Taipei, Taiwan, observes normal trading hours of 9:00 a.m. to 1:30 p.m. local time. Active trading of securities traded on this exchange ends. and closing prices for those securities are posted, at 1:30 p.m. local time (1:30 a.m. Eastern time). When Defendants calculate their fund NAV using closing prices from this exchange, Defendants rely upon closing prices for securities traded on this exchange that have been static for 14.5 hours.

21. The exchange located in Hong Kong observes normal trading hours of 10:00 a.m. to 4:00 p.m. local time. Active trading of securities traded on this exchange ends, and closing prices for those securities are posted, at 4:00 p.m. local time (4:00 a.m. Eastern time). When Defendants calculate their fund NAV using closing prices from this exchange, Defendants rely upon closing prices for securities traded on this exchange that have been static for 12 hours.

22. The exchange located in Kuala Lumpur, Malaysia, observes normal trading hours of 9:30 a.m. to 5:00 p.m. local time. Active trading of securities traded on this exchange ends, and closing prices for those securities are posted, at 5:00 p.m. local time (5:00 a.m. Eastern time). When Defendants calculate their fund NAV using closing prices from this exchange, Defendants rely upon closing prices for securities traded on this exchange that have been static for 11 hours.

23. The exchange located in Singapore observes normal trading hours of 9:00 a.m. to 5:00 p.m. local time. Active trading of securities traded on this exchange ends, and closing prices for those securities are posted, at 5:00 p.m. local time (5:00 a.m. Eastern time). When Defendants calculate their fund NAV using closing prices from this ex-

change, Defendants rely upon closing prices for securities traded on this exchange that have been static for 11 hours.

24. The exchange located in Moscow, Russia, observes normal trading hours of 12:00 p.m. to 7:00 p.m. local time. Active trading of securities traded on this exchange ends, and closing prices for those securities are posted, at 7:00 p.m. local time (11:00 a.m. Eastern time). When Defendants calculate their fund NAV using closing prices from this exchange, Defendants rely upon closing prices for securities traded on this exchange that have been static for 5 hours.

25. The exchange located in Frankfurt, Germany, observes normal trading hours of 9:00 a.m. to 8:00 p.m. local time. Active trading of securities traded on this exchange ends, and closing prices for those securities are posted, at 8:00 p.m. local time (2:00 p.m. Eastern time). When Defendants calculate their fund NAV using closing prices from this exchange, Defendants rely upon closing prices for securities traded on this exchange that have been static for 2 hours.

26. The exchange located in Paris, France, observes normal trading hours of 9:00 a.m. to 5:30 p.m. local time. Active trading of securities traded on this exchange ends, and closing prices for those securities are posted at, 5:30 p.m. local time (11:30 a.m. Eastern time). When Defendants calculate their fund NAV, using closing prices from this exchange Defendants rely upon closing prices for securities traded on this exchange that have been static for 4.5 hours.

27. The exchange located in London, England, observes normal market hours of 8:00 a.m. to 4:30 p.m. local time. Active trading of securities traded on this exchange ends, and closing prices for those securities are posted at 4:30 p.m. local time (11:30 a.m. Eastern time). When Defendants calculate their fund NAV using closing prices from this exchange, Defendants rely upon closing prices for securities traded on this exchange that have been static for 4.5 hours.

28. A significant portion of the underlying foreign securities in the Defendants' fund portfolio are listed on foreign exchanges and trade during each market's respective session. The NAVs set by Defendants do not take into account on a daily basis any price relevant information that has become available in this two to fourteen and one/half hour interval, after the final prices for the underlying foreign securities have been posted but, prior to the setting of the NAVs. Price relevant information, such as the continuous trading of world equity market indexes, ADRs, and foreign currency futures impacts the valuation of these underlying foreign securities and is significant for valuation because the final market prices have become stale and do not reflect the current market value of the securities.

29. By failing to make daily adjustments based upon positive correlations between upward or downward movements in United States and foreign markets and by choosing to use stale prices in valuing their fund shares and setting their daily NAVs, Defendants have exposed long term shareholders to market timing traders who regularly purchase and redeem Defendants' fund shares as part of a profitable trading strategy. The market timing trading strategy stems from the ability of market timing traders to predict changes in the NAV. Market timing traders are able to predict changes in the NAV because of the positive correlations between value movements in United States markets and foreign markets. The stale price strategy of market timers who trade Defendants' shares is to buy shares on days when the United States market moves up and to sell (redeem) shares when the United States market moves down. In order to derive maximum benefit from price relevant information developed subsequent to the now stale closing prices of the portfolio securities, market timers wait until the fund deadline for buying or selling (redeeming) shares in Defendants' funds on any particular business day. Because Defendants cannot buy or sell the foreign securities in the funds' underlying portfolio (due to the time difference between New York and the home mar-

kets of the foreign securities) at the time it sets the daily NAV that values the shares it issues and redeems, the shares that Defendants issue to and redeem from market timers do not reflect current market prices of the foreign securities held by the fund.

30. Due to the use of stale prices by Defendants in valuing the fund shares, market timers who buy Defendants' fund shares on days when the United States market moves up are buying discounted shares at the expense of other fund shareholders because the fund's underlying foreign securities assets are undervalued as of the time of the share purchase.

31. Due to the use of stale prices by Defendants in valuing their fund shares, market timers who sell (redeem) Defendants' fund shares on days when the United States market moves down are selling (redeeming) shares at a premium at the expense of other fund shareholders because the underlying foreign securities assets are overvalued as of the time of the share sale (redemption).

32. Shares in Defendants' funds can be traded, either by purchase or redemption, only once a day at 4:00 p.m. Eastern Time.

33. The excess profits that are obtained by market timing traders' taking advantage of the stale pricing of Defendants' fund shares come at the expense of fellow shareholders who are non-trading long term buy and hold investors. The transfer of wealth from the non-trading long term buy and hold shareholders to the market timers trading Defendants' fund shares occurs through dilution.

34. Market timing traders pay cash to Defendants' funds when they purchase discounted shares. Market timing traders receive cash from Defendants' funds when they sell (redeem) their shares at a premium. Defendants' fund NAV is diluted in both instances. When market timing traders are able to buy shares at a discount, Defendants' fund assets suffer dilution because the cash received by the fund for each of the shares purchased is less than the

per share value of the underlying foreign securities because of the stale pricing utilized by Defendants. Likewise, when market timing traders are able to sell (redeem) shares at a premium, Defendants' fund assets suffer dilution because the cash paid out by the fund for each of the shares redeemed is more than the per share value of the underlying securities, again due to the stale pricing utilized by Defendants. In both instances, when Defendants receive less cash when issuing and pay out more cash when redeeming market timing trader shares than supported by the value of their underlying foreign securities, the result is a dilution of Defendants' cash. Since the cash held by the fund is one of the assets that is valued in setting the Defendants' daily fund NAV, it follows that the diluted fund cash position causes the fund NAV to be diluted as well. Due to the stale pricing utilized by Defendants, long term buy and hold shareholders have incurred a dilution in the NAV of their shares and the wealth represented by that diluted amount has been transferred to market timing traders.

35. By failing to make daily adjustments based upon positive correlations between upward movements in United States and foreign markets, world equity index market trading, ADRs, foreign currency futures and by choosing to use stale prices in valuing the underlying foreign securities that are used setting their daily NAV, Defendants give market timing traders the opportunity to earn vastly higher returns at no additional risk. Unlike other market timing based trading, market timers who trade Defendants' shares do not have to look into the future to time their purchases and redemptions of shares, rather, they have the luxury of being able to look backwards because Defendants' share pricing fails to adjust for recognized positive correlations and uses stale prices in valuing its underlying portfolio securities.

36. Since it is such an attractive low risk trading vehicle to market timers, Defendants' funds experience increased trading and transaction costs, disruption of

planned investment strategies, forced and unplanned portfolio turnover including the liquidation of investments to meet market timer redemption requests, lost opportunity costs and asset swings that negatively impact fund operations, performance and the ability of the fund to provide a maximized return to long term shareholders.

37. Plaintiff brings this complaint as a class action against Defendants Columbia Trust and Columbia Fund Manager, and pursuant to § 5/2-801 et seq., of the Illinois Code of Civil Procedure individually and on behalf of a class of all persons in the United States who have held shares of Columbia Acorn for more than fourteen days from the date of purchase to the date of sale (redemption) or exchange ("long term shareholders"). The class period commences five years prior to the fling of this complaint through the date of filing. Excluded from the class are Defendants, any parent, subsidiary, affiliate, or controlled person of Defendants, as well as the officers, directors, agents, servants or employees of Defendants, and the immediate family members of any such person. Also excluded is any judge who may preside over this case.

38. Plaintiff is a member of the class and will fairly and adequately assert and protect the interests of the class. The interest of the Plaintiff is coincident with, and not antagonistic to, those of other members of the class. Plaintiff has retained attorneys who are experienced in class action litigation.

39. Members of the class are so numerous that joinder of all members is impracticable.

40. Common questions of law or fact predominate over any questions affecting only individual members of the Class. Common questions include, but are not limited to, the following:

a. whether defendants failed to properly evaluate on a daily basis whether a significant event affecting the value of Columbia Acorn's portfolio of securities had occurred after the foreign home markets for

such securities had closed but before the fund's NAV calculation and share price setting;

b. whether defendants failed to properly implement Columbia Acorn's portfolio valuation and share pricing policies and procedures making daily adjustments based upon United States market results and recognized positive correlations between upward movements in United States and foreign markets in the valuation of the fund's portfolio securities prior to the calculation of the fund NAV and setting of the share price;

c. whether defendants failed to properly implement Columbia Acorn's portfolio valuation and share pricing policies and procedures making daily adjustments to stale closing prices of the underlying portfolio securities before the fund's NAV calculation and share price setting;

d. whether defendants failed to properly implement Columbia Acorn's portfolio valuation and share pricing policies so as to require the use of fair value pricing on a daily basis to value portfolio securities and fund NAV and share prices when closing prices of portfolio securities did not reflect their market values;

e. whether defendants failed to protect Columbia Acorn's long term shareholders from market timing traders using fund shares as a trading vehicle to earn profits at the expense of long term shareholders because of the failure of defendants to make daily adjustments, based upon known United States market results and recognized positive correlations between upward movements in United States and foreign markets, prior to the daily calculation of the fund NAV and the setting of share prices as well as their use of stale prices in the valuation of the fund's portfolio securities prior to

the daily calculation of the fund NAV and the setting of share price;

f. whether defendants breached the duties they owed to plaintiff and the class;

g. whether plaintiff and the class have been damaged and, if so,

h. the extent of such damages.

41. The prosecution of separate actions by individual members of the Class would create a risk of:

a. inconsistent or varying adjudications with respect to individual members of the class; and

b. adjudication with respect to individual members of the class, which would, as a practical matter, be dispositive of the interests of other members not parties to the adjudication or substantially impair or impede their ability to protect their interest.

42. The class action method is appropriate for the fair and efficient prosecution of this action.

43. Individual litigation of all claims, which might be brought by all class members would produce a multiplicity of cases so that the judicial system would be congested for years. Class treatment, by contrast, provides manageable judicial treatment calculated to bring a rapid conclusion to all litigation of all claims arising from the conduct of the defendants.

COUNT I

Plaintiff, Gary Vogeler, individually and on behalf of all others similarly situated, by and through his undersigned counsel, and for Count I of his Complaint against Defendants Columbia Trust and Columbia Fund Manager, states as follows:

44. Plaintiff repeats and incorporates by reference paragraphs 1 through 43 as if fully set forth herein.

45. Defendant Columbia Trust operates Columbia Acorn as an open end mutual fund with the stated goal of providing long term capital growth to investors who hold shares of the fund. The fund expressly states in its prospectus that it seeks to achieve its investment goal through a policy of investing in stocks and debt obligations of companies outside of the United States.

46. Defendant Columbia Fund Manager serves as the investment manager for Columbia Acorn. Defendant Columbia Fund Manager provides, among other things, portfolio management services and selects the securities for Columbia Acorn to buy, hold or sell. Columbia Acorn pays Defendant Columbia Fund Manager set fees based on the percentage of assets under management for managing Columbia Acorn's assets. Defendant Columbia Fund Manager's compensation and management of the Columbia Acorn are required to be reviewed and approved by Defendant Columbia Trust's board of trustees.

47. At all times relevant hereto, Plaintiff Gary Vogeler has held shares in Columbia Acorn.

48. At all times relevant herein, Defendants had a duty when valuing the fund's securities and determining daily NAV to utilize accurate current market values for such securities in order to avoid dilution in the value of long term shareholders' holdings.

49. Defendants breached their duties of due care owed to Plaintiff Gary Vogeler and similarly situated shareholders of the Columbia Acorn by, inter alia:

a. failing to properly evaluate on a daily basis whether a significant event affecting the value of Columbia Acorn's portfolio of securities had occurred after the foreign trading markets for such securities had closed but before Defendants calculated NAV and share price;

b. failing to implement Columbia Acorn's portfolio valuation and share pricing policies and procedures; and

c. allowing portfolio valuation and share pricing policies and procedures which benefited market timing traders of Columbia Acorn's shares at the expense of long term shareholders.

50. As a direct and proximate result of the Defendants' breach of their duties, Plaintiff and the class have suffered damages in the amount to be proven at trial, but less than $75,000 per plaintiff or class member, including all compensatory damages, punitive damages, attorneys' fees and costs.

WHEREFORE, Plaintiff and the Class pray that the Court enter judgment in their favor and against Columbia Trust and Columbia Fund Manager, as follows:

A. Ordering that this action be maintained as a class action pursuant to 735 ILCS 5/2 801 and the following class be certified:

> All persons in the United States who held shares in the Columbia Acorn for a period of more than fourteen days before redeeming or exchanging them during the period beginning from five years prior to and through the date of the filing of this complaint;

B. Awarding Plaintiff and the Class compensatory damages, prejudgment interest, costs of suits, punitive damages and attorneys' fees for an amount representing the damages caused by Defendants' breach of their duties not to exceed $75,000 per plaintiff or class member.

PLAINTIFF DEMANDS TRIAL BY JURY

COUNT II

Plaintiff Gary Vogeler, individually and on behalf of all others similarly situated, by and through his undersigned counsel, and for Count II of his Complaint against Defen-

dants Columbia Trust and Columbia Fund Manager, states as follows:

51. Plaintiff repeats and incorporates by reference paragraphs 1 through 48 as if fully set forth herein.

52. On or about January 1, 1965, applicable published regulations expressly recognized that changes in trading prices of securities in the Columbia Acorn might occur daily after the closing of the New York Stock Exchange.

53. Defendants knew, or were negligent in not knowing, that the closing prices for the foreign securities held by the Columbia Acorn and used by Defendants to calculate NAV for said Fund did not represent current market value because, inter alia, those prices did not reflect changes in the fund's securities which occurred after the exchange on which those foreign securities trade closed and before the daily calculation of the fund NAV and the setting of share price.

54. With utter indifference and conscious disregard for Plaintiff's investment and the investments of similarly situated fund shareholders, Defendants willfully and wantonly breached their duties to Plaintiff and similarly situated shareholders by, inter alia:

a. failing to know and implement applicable rules and regulations concerning the calculation of NAV;

b. failing to properly evaluate on a daily basis whether a significant event affecting the value of Columbia Acorn's portfolio of securities had occurred after the foreign trading markets for such securities had closed but before Defendants calculated NAV and share price;

c. failing to implement Columbia Acorn's portfolio valuation and share pricing policies and procedures; and

d. allowing portfolio valuation and share pricing policies and procedures which benefited market timing

traders of Columbia Acorn's shares at the expense of long term shareholders.

55. As a direct and proximate result of the Defendants' breach of their duties, Plaintiff Bridges and the class have suffered damages in the amount to be proven at trial, but less than $75,000 per plaintiff or class member, including all compensatory damages, punitive damages, attorneys' fees and costs.

WHEREFORE, Plaintiff and the Class pray that the Court enter judgment in their favor and against Columbia Trust and Columbia Fund Manager, as follows:

A. Ordering that this action be maintained as a class action pursuant to 735 ILCS 5/2 801 and the following class be certified:

> All persons in the United States who held shares in the Columbia Acorn for a period of more than fourteen days before redeeming or exchanging them during the period beginning from five years prior to and through the date of the filing of this complaint;

B. Awarding Plaintiff and the Class compensatory damages, prejudgment interest, costs of suits, punitive damages and attorneys' fees for an amount representing the damages caused by Defendants' breach of their duties not to exceed $75,000 per plaintiff or class member.

PLAINTIFF DEMANDS TRIAL BY JURY

[attorney name and address blocks omitted]

IN THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

Cause No. 03-L-2036

AVERY JACKSON, INDIVIDUALLY AND
ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Plaintiffs,

v.

VAN KAMPEN SERIES FUND, INC. AND
VAN KAMPEN INVESTMENT ADVISORY CORP.,
Defendants.

[Filed Dec. 18, 2003]

COMPLAINT

Plaintiff, Avery Jackson, individually and on behalf of all others similarly situated, by and through his undersigned counsel, and for his complaint against Defendants Van Kampen Series Fund, Inc. and Van Kampen Investment Advisory Corp., states as follows:

1. Plaintiff, Avery Jackson, is a resident of South Roxanna, Madison County, Illinois.

2. Defendant, Van Kampen Series Fund, Inc. ("Van Kampen Funds"), is a Maryland corporation with its principal place of business in Oakbrook Terrace, IL. Van Kampen Funds is the registrant of the Van Kampen International Magnum Fund ("Van Kampen International"). Defendant Van Kampen Funds does business in the state of Illinois and is registered as a mutual fund in the State of Illinois. Defendant, Van Kampen Funds, has consented to the jurisdiction of Illinois courts. Defendant Van Kampen Funds at all times relevant herein has promoted, marketed, and sold shares to the investing public nationwide

including the state of Illinois. Defendant Van Kampen Funds maintains investor relationships nationwide including with shareholders in the state of Illinois. Defendant Van Kampen Funds has significant contacts with Madison County and the activities complained of herein occurred, in whole or part, in Madison County, Illinois.

3. Defendant, Van Kampen Investment Advisory Corp. ("Van Kampen Advisor") is a Delaware corporation with its principal place of business in Oakbrook Terrace, IL. The day-to-day tasks associated with running the business of Van Kampen International, such as investment management, share marketing, distribution, redemption, financial and regulatory reporting, and custodianship of funds are contracted out since it has no significant number of internal employees. Defendant Van Kampen Advisor has been contracted to serve as the investment manager for the Van Kampen International Magnum Fund. As the investment manager for Van Kampen International, Defendant Van Kampen Advisor selects the fund's investments and operates or supervises most phases of the fund's business including the valuing of the fund's portfolio securities and the fund net asset value. Defendant Van Kampen Advisor has significant contacts with fund shareholders in Madison County as a result of its operation and supervision of Van Kampen International's business and the activities complained of herein occurred, in whole or in part, in Madison County, Illinois. Defendant Van Kampen Advisor utilizes an interactive web site to communicate with fund shareholders, including those in Madison County, Illinois regarding the performance of the Fund and the investments it manages.

4. At all times relevant herein, Plaintiff, Avery Jackson, has owned and held shares in the Van Kampen International for the purpose of long term investing m international securities.

5. This Court has jurisdiction over the subject matter and the parties pursuant to 735 ILCS 5/2-209.

6. Venue is proper in this Court pursuant to 735 ILCS 5/2-101.

7. The foreign securities purchased by Defendants' fund for its portfolio are principally traded in securities markets outside of the United States.

8. Open end mutual funds such as Defendants' fund have been tremendously successful in convincing investors such as Plaintiff to hold their fund shares by urging investors to invest for the long term and by effectively marketing the various advantages of long term ownership of funds over direct investment including professional management, diversification, and liquidity.

9. Shares of open end mutual funds are sold to investors such as Plaintiff at a price based upon the net asset value ("NAV") per share plus applicable sales charges. Investors in shares may redeem their shares at the NAV of the shares less any redemption charges.

10. The share prices (NAV) of Defendants' mutual funds are set by deducting the fund liabilities from the total assets of the portfolio and then dividing by the number of outstanding shares.

11. Because the sales and redemption prices are based upon NAV, which m turn depends upon the fluctuating value of the fund's underlying portfolio of securities, Defendants recalculate the fund net asset value every business day. Defendants set the fund share price (NAV) once every business day at the close of trading on the New York Stock Exchange at 4:00 p.m. Eastern Time. The NAV of the shares is reported by Defendants to the National Association of Securities Dealers (NASD) for public distribution.

12. In valuing its underlying assets for purposes of setting the NAV, Defendants use the last trade price in the home market of each of the securities in its portfolio. A significant portion of the securities in the Defendants' fund portfolio are foreign securities. The home markets for such foreign securities include London, Paris, Frankfurt, Moscow, Singapore, Kuala Lumpur, Hong Kong, Taipei,

Tokyo and Sydney. These markets are located in time zones that are five hours to fifteen hours ahead of Eastern Standard Time.

13. Studies of world financial markets have established associations between the value changes among various markets. There is a positive correlation between value movements in the United States market and value movements in foreign markets. If the United States market experiences an upward movement in values, it can be predicted that Asian markets will move upward once trading begins their next day. The same upward movement can be predicted for European markets once trading begins their next day. Similarly, if the United States market experiences a downward movement in values, it can be predicted that Asian and European markets will move downward once trading begins their next day. Because of these positive correlations, the closing prices of the foreign securities in the underlying portfolio may not reflect current market values at the time Defendants set their fund NAV. Appropriate adjustments need to be made to the closing prices of the foreign securities in order to reflect current market values. Despite knowledge of the United States market result, continuous trading of the world equity indexes, ADRs, foreign currency futures markets and the correlations between the value of the fund's securities and these benchmarks, Defendants do not make any value adjustment to the portfolio's foreign securities prior to calculating fund NAV and setting share price every business day.

14. The positive correlation between the upward or downward movement of value in the United Stares market and subsequent movements in foreign markets around the world is between 0.7 and 0.8. A value of 0.0 equates to absolutely no correlation between value movements in United States markets and subsequent movements in foreign markets. A value of 1.0 equates to an absolute correlation between value movements in United States markets and subsequent value movements in foreign markets.

15. Studies of world financial markets demonstrate that the greater the percentage increase or decrease in the value of United States markets, the more likely foreign markets will post corresponding value movements on subsequent days. The probability that the value movements of foreign markets will follow the previous day's value movements in United States markets is directly correlated with the degree or extent of the value movement of United States markets.

16. Because many of the home markets for the foreign securities in the Defendants' asset portfolio last traded hours before the setting at 4:00 p.m. Eastern of the fund NAV, the closing prices used to calculate the NAV of Defendants' fund are stale and do not reflect price relevant information available subsequent in the foreign securities' last trades that will affect the value of such securities.

17. During the interval that elapses between the time that Defendants set the fund share NAV (and release it to the NASD for communication to the public) on consecutive days, the securities markets in Australia, Japan, Taiwan, Hong Kong, Malaysia, Singapore, Russia, Germany, France and the United Kingdom have traded for an entire session from open to close.

18. The exchange located in Sydney, Australia observes normal market trading hours of 10:00 a.m. and 4:00 p.m. local time. Active trading of securities traded on this exchange ends, and closing prices for those securities are posted, at 4:00 p.m. local time (2:00 a.m. Eastern time). When Defendants calculate their fund NAV using closing prices from this exchange, Defendants rely upon closing prices for securities traded on this exchange that have been static for 14 hours.

19. The exchange located in Tokyo, Japan observes normal trading hours of 9:00 a.m. to 3:00 p.m. local time. Active trading of securities traded on this exchange ends, and closing prices for those securities are posted, at 3:00 p.m. local time (2:00 a.m. Eastern time). When Defendants calculate their fund NAV using closing prices from

this exchange, Defendants rely upon closing prices for securities traded on this exchange that have been static for 14 hours.

20. The exchange located in Taipei, Taiwan observes normal trading hours of 9:00 a.m. to 1:30 p.m. local time. Active trading of securities traded on this exchange ends, and closing prices for those securities are posted, at 1:30 p.m. local time (1:30 a.m. Eastern time). When Defendants calculate their fund NAV using closing prices from this exchange, Defendants rely upon closing prices for securities traded on this exchange that have been static for 14.5 hours.

21. The exchange located in Hong Kong observes normal trading hours of 10:00 a.m. to 4:00 p.m. local time. Active trading of securities traded on this exchange ends, and closing prices for those securities are posted, at 4:00 p.m. local time (4:00 a.m. Eastern time). When Defendants calculate their fund NAV using closing prices from this exchange, Defendants rely upon closing prices for securities traded on this exchange that have been static for 12 hours.

22. The exchange located in Kuala Lumpur, Malaysia observes normal trading hours of 9:30 a.m. to 5:00 p.m., local time. Active trading of securities traded on this exchange ends, and closing prices for those securities are posted, at 5:00 p.m. local time (5:00 a.m. Eastern time). When Defendants calculate their fund NAV using closing prices from this exchange, Defendants rely upon closing prices for securities traded on this exchange that have been static for 11 hours.

23. The exchange located in Singapore observes normal trading hours of 9:00 a.m. to 5:00 p.m. local time. Active trading of securities traded on this exchange ends, and closing prices for those securities are posted, at 5:00 p.m. local time (5:00 a.m. Eastern time). When Defendants calculate their fund NAV using closing prices from this exchange, Defendants rely upon closing prices for securities traded on this exchange that have been static for 11 hours.

24. The exchange located in Moscow, Russia observes normal trading hours of 12:00 p.m. to 7:00 p.m. local time. Active trading of securities traded on this exchange ends, and closing prices for those securities are posted, at 7:00 p.m. local time (11:00 a.m. Eastern time). When Defendants calculate their fund NAV using closing prices from this exchange, Defendants rely upon closing prices for securities traded on this exchange that have been static for 5 hours.

25. The exchange located in Frankfurt, Germany observes normal trading hours of 9:00 a.m. to 8:00 p.m. local time. Active trading of securities traded on this exchange ends, and closing prices for those securities are posted, at 8:00 p.m. local time (2:00 p.m. Eastern time). When Defendants calculate their fund NAV using closing prices from this exchange, Defendants rely upon closing prices for securities traded on this exchange that have been static for 2 hours.

26. The exchange located in Paris, France observes normal trading hours of 9:00 a.m. to 5:30 p.m. local time. Active trading of securities traded on this exchange ends, and closing prices for those securities are posted at, 5:30 p.m. local time (11:30 a.m. Eastern time). When Defendants calculate their fund NAV using closing prices from this exchange Defendants rely upon closing prices for securities traded on this exchange that have been static for 4.5 hours.

27. The exchange located in London, England observes normal market hours of 8:00 a.m. to 4:30 p.m. local time. Active trading of securities traded on this exchange ends, and closing prices for those securities are posted at 4:30 p.m. local time (11:30 a.m. Eastern time). When Defendants calculate their fund NAV using closing prices from this exchange, Defendants rely upon dosing prices for securities traded on this exchange that have been static for 4.5 hours.

28. A significant portion of the underlying foreign securities in the Defendants' fund portfolio are listed on foreign

exchanges and trade during each market's respective session. The NAVs set by Defendants do not take into account on a daily basis any price relevant information that has become available in this two to fourteen and one/half hour interval, after the final prices for the underlying foreign securities have been posted but, prior to the setting of the NAVs. Price relevant information, such as the continuous trading of world equity market indexes, ADRs, and foreign currency futures impacts the valuation of these underlying foreign securities and is significant for valuation because the final market prices have become stale and do not reflect the current market value of the securities.

29. By failing to make daily adjustments based upon positive correlations between upward or downward movements in United States and foreign markets and by choosing to use stale prices in valuing their fund shares and setting their daily NAVs, Defendants have exposed long term shareholders to market timing traders who regularly purchase and redeem Defendants' shares as part of a profitable trading strategy. The market timing trading strategy stems from the ability of market timing traders to predict changes in the NAV. Market timing traders are able to predict changes in the NAV because of the positive correlations between value movements in United States markets and foreign markets. The stale price strategy of market timers who trade Defendants' fund shares is to buy shares on days when the United States market moves up and to sell (redeem) shares when the United States market moves down. In order to derive maximum benefit from price relevant information developed subsequent to the now stale closing prices of the portfolio securities, market timers wait until the fund deadline for buying or selling (redeeming) shares in Defendants' funds on any particular business day. Because Defendants cannot buy or sell the foreign securities in the fund's underlying portfolio (due to the time difference between New York and the home markets of the foreign securities) at the time it sets the daily NAV that values the shares it issues and redeems, the

shares that Defendants issue to and redeem from market timers do not reflect current market prices of the foreign securities held by the fund.

30. Due to the use of stale prices by Defendants in valuing the fund shares, market timers who buy Defendants' fund shares on days when the United States market moves up are buying discounted shares at the expense of other fund shareholders because the funds underlying foreign securities assets are undervalued as of the time of the share purchase.

31. Due to the use of stale prices by Defendants in valuing their fund shares, market timers who sell (redeem) Defendants' fund shares on days when the United States market moves down are selling (redeeming) shares at a premium at the expense of other fund shareholders because the underlying foreign securities assets are overvalued as of the time of the share sale (redemption).

32. Shares in Defendants' fund can be traded, either by purchase or redemption, only once a day at 4:00 p.m. Eastern Time.

33. The excess profits that are obtained by market timing traders' taking advantage of the stale pricing of Defendants' fund shares come at the expense of fellow shareholders who are non-trading long term buy and hold investors. The transfer of wealth from the non-trading long term buy and hold shareholders to the market timers trading Defendants' fund shares occurs through dilution.

34. Market timing traders pay cash to Defendants' fund when they purchase discounted shares. Market timing traders receive cash from Defendants' fund when they sell (redeem) their shares at a premium. Long term shareholders suffer a dilution of their equity interests and voting rights in both instances. When market timing traders are able to buy shares at a discount, long term contract holders suffer dilution because the cash received by the fund for each of the shares purchased is less than the per share value of the underlying foreign securities due to the

stale pricing method utilized by Defendants. Likewise, when market timing traders are able to sell (redeem) shares at a premium, long term shareholders suffer dilution because the cash paid out by the fund for each of the shares redeemed is more than the per share value of the underlying securities, again due to the stale pricing method utilized by Defendants. In both instances, long term shareholders' equity interests and voting rights are diluted.

35. By failing to make daily adjustments based upon positive correlations between upward movements in United States and foreign markets, world equity index market trading, ADRs, and foreign currency futures and by choosing to use stale prices in valuing the underlying foreign securities that are used setting their daily NAV, Defendants give market timing traders the opportunity to earn risk free returns. Unlike other market timing based trading, market timers who trade Defendants' shares do not have to look into the future to time their purchases and redemptions of shares. Rather, they have the luxury of being able to look backwards because Defendants' share pricing fails to adjust for recognized positive correlations and uses stale prices in valuing its underlying portfolio securities.

36. Effective market timing captures an arbitrage profit that comes dollar-for-dollar out of the pockets of long-term investors. Besides the wealth transfer through dilution, the market timers also harm long term investors in other ways.

37. Plaintiff bring [*sic*] this complaint as a class action against Defendants Van Kampen Series Fund, Inc. and Van Kampen Investment Advisory Corp., and pursuant to § 5/2-801 et seq., of the Illinois Code of Civil Procedure individually and on behalf of a class of all persons in the United States who have held shares of Van Kampen International for more than fourteen days. The class period commences five years prior to the filing of this complaint through the date of filing. Excluded from the class are De-

fendants, any parent, subsidiary, affiliate, or controlled person of Defendants, as well as the officers, directors, agents, servants or employees of Defendants, and the immediate family members of any such person. Also excluded is any judge who may preside over this case.

38. Plaintiff is a member of the class and will fairly and adequately assert and protect the interests of the class. The interest of the Plaintiff is coincident with, and not antagonistic to, those of other members of the class. Plaintiff has retained attorneys who are experienced in class action litigation.

39. Members of the class are so numerous that joinder of all members is impracticable.

40. Common questions of law or fact predominate over any questions affecting only individual members of the Class. Common questions include, but are not limited to, the following:

i. whether defendants failed to properly evaluate on a daily basis price relevant reformation available after the close of the exchange in which Van Kampen International's portfolio of securities trade, but before the setting of the daily NAV, which was likely to change the value of the securities and the setting of their daily NAV;

ii. whether defendants failed to properly implement Van Kampen International's portfolio valuation and share pricing policies and procedures making daily adjustments based upon United States market results and recognized positive correlations between upward movements in United States and foreign markets in the valuation of the fund's portfolio securities prior to the calculation of the fund NAV and setting of the share price;

iii. whether defendants failed to properly implement Van Kampen International's portfolio valuation and share pricing policies and procedures making

daily adjustments to stale closing prices of the underlying portfolio securities before the fund's NAV calculation and share price setting;

iv. whether defendants failed to protect Van Kampen International's long term shareholders from market timing traders using fund shares as a trading vehicle to earn profits at the expense of long term shareholders because of the failure of defendants to make daily adjustments, based upon known United States market results and recognized positive correlations between upward movements in United States and foreign markets, prior to the daily calculation of the fund NAV and the setting of share prices as well as their use of stale prices in the valuation of the fund's portfolio securities prior to the daily calculation of the fund NAV and the setting of share prices;

v. whether defendants breached the duties they owed to plaintiff and the class;

vi. whether plaintiff and the class have been damaged and, if so,

vii. the extent of such damages.

41. The prosecution of separate actions by individual members of the Class would create a risk of:

i. inconsistent or varying adjudications with respect to individual members of the class; and

ii. adjudication with respect to individual members of the class, which would, as a practical matter, be dispositive of the interests of other members not parties to the adjudication or substantially impair or impede their ability to protect their interest.

42. The class action method is appropriate for the fair and efficient prosecution of this action.

43. Individual litigation of all claims, which might be brought by all class members would produce a multiplicity

of cases so that the judicial system would be congested for years. Class treatment, by contrast, provides manageable judicial treatment calculated to bring a rapid conclusion to all litigation of all claims arising from the conduct of the defendants.

Count I

Plaintiff, Avery Jackson, individually and on behalf of all others similarly situated, by and through his undersigned counsel, and for Count I of his Complaint against Defendants Van Kampen Funds and Van Kampen Advisor, states as follows:

44. Plaintiff repeat [*sic*] and incorporate [*sic*] by reference paragraphs 1 through 43 as if fully set forth herein.

45. Defendant Van Kampen Funds operates Van Kampen International as an open end mutual fund with the stated goal of providing long term capital growth to investors who hold shares of the fund. The fund expressly states in its prospectus that it seeks to achieve its investment goal through a policy of investing in stocks and debt obligations of companies outside of the United States.

46. Defendant Van Kampen Advisor serves as the investment manager for Van Kampen International. Defendant Van Kampen Advisor provides, among other things, portfolio management services and selects the securities for Van Kampen International to buy, hold or sell. Van Kampen International pays Defendant Van Kampen Advisor set fees based on the percentage of assets under management for managing Van Kampen International's assets. Defendant Van Kampen Advisor's compensation and management of the Van Kampen International are required to be reviewed and approved by Defendant Van Kampen Funds' board of trustees.

47. At all times relevant hereto, Plaintiff Avery Jackson has held shares in Van Kampen International.

48. At all times relevant herein, Defendants had a duty when valuing the fund's securities and determining daily

NAV to utilize accurate current market values for such securities in order to avoid dilution in the value of long term shareholders' equity interests and voting rights.

49. Defendants breached their duties of due care owed to Plaintiff Avery Jackson and similarly situated shareholders of the Van Kampen International by, inter alia:

i. failing to properly evaluate on a daily basis price relevant information available after the close of the exchange on which Van Kampen International's portfolio of securities trade, but before the setting of the NAV, which was likely to change the value of the securities and the setting of their NAV;

ii. failing to properly adjust the value of Van Kampen International's portfolio securities and the setting of their NAV's when price relevant information available after the close of the exchange on which the portfolio's securities trade, but before the setting of the NAV, indicated a change in the value of the securities: and

iii. allowing portfolio valuation and share pricing policies and procedures which benefitted market timing traders of Van Kampen International's shares at the expense of long term shareholders.

50. As a direct and proximate result of the Defendants' breach of their duties, Plaintiff Avery Jackson and the class have suffered damages in the amount to be proven at trial, but less than $75,000 per plaintiff or class member, including all compensatory damages, attorneys' fees and costs.

WHEREFORE, Plaintiff and the Class pray that the Court enter judgment in their favor and against Van Kampen International and Van Kampen Investment Advisory Corp., as follows:

A. Ordering that this action be maintained as a class action pursuant to 735 ILCS 5/2 801 and the following class be certified:

All persons in the United States who held shares in the Van Kampen International for a period of more than fourteen days during the period beginning from five years prior to and through the date of the filing of this complaint;

B. Awarding Plaintiff and the Class compensatory damages, prejudgment interest, costs of suits, and attorneys' fees for an amount representing the damages caused by Defendants' breach of their duties not to exceed $75,000 per plaintiff or class member.

Count II

Plaintiff, Avery Jackson, individually and on behalf of all others similarly situated, by and through his undersigned counsel, and for Count II of his Complaint against Defendants Van Kampen Funds and Van Kampen Advisor, states as follows:

51. Plaintiff repeat [*sic*] and incorporate [*sic*] by reference paragraphs 1 through 48 as if fully set forth herein.

52. Defendants knew, or were negligent in not knowing, that the closing prices for the foreign securities held by Van Kampen International and used by Defendants to calculate NAV for said Fund did not represent current market value because, inter alia, those prices did not reflect changes in the fund's securities which occurred after the exchange on which those foreign securities trade closed and before defendants calculated NAV and share price.

53. With utter indifference or conscious disregard for Plaintiff Avery Jackson's investment and the investments of similarly situated fund shareholders, Defendants breached their duties to Plaintiff Avery Jackson and similarly situated shareholders by, inter alia:

i. failing to properly evaluate on a daily basis price relevant information available after the close of the exchange on which Van Kampen International's portfolio of securities trade, but before the setting

of the NAV, which was likely to change the value of the securities and the setting of their NAV;

ii. failing to properly adjust the value of Van Kampen International's portfolio of securities and the setting of their NAV when price relevant information available after the close of the exchange on which the portfolio's securities trade, but before the setting of the NAV, indicated a change in the value of the securities;

iii. failing to implement Van Kampen International's portfolio valuation and share pricing policies and procedures; and

iv. allowing portfolio valuation and share pricing policies and procedures which benefitted market timing traders of Van Kampen International's shares at the expense of long term shareholders.

54. As a direct and proximate result of the Defendants' breach of their duties, Plaintiff Avery Jackson and the class have suffered damages in the amount to be proven at trial, but less than $75,000 per plaintiff or class member, including all compensatory damages, punitive damages, attorneys' fees and costs.

WHEREFORE, Plaintiff and the Class pray that the Court enter judgment in their favor and against Van Kampen Series Fund, Inc. and Van Kampen Investment Advisory Corp., as follows:

A. Ordering that this action be maintained as a class action pursuant to 735 ILCS 5/2 801 and the following class be certified:

> All persons in the United States who held shares in the Van Kampen International for a period of more than fourteen days during the period beginning from five years prior to and through the date of the filing of this complaint;

B. Awarding Plaintiff and the Class compensatory damages, prejudgment interest, costs of suits, punitive damages and attorneys' fees for an amount representing the damages caused by Defendants' breach of their duties not to exceed $75,000 per plaintiff or class member.

[attorney name and address blocks omitted]

IN THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

Cause No. 04-L-241

TERRY SPURGEON, AS CUSTODIAN FOR THE BENEFIT OF JAMES E. SPURGEON, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Plaintiff.

v.

PACIFIC LIFE INSURANCE COMPANY,
Defendant.

[Filed Mar. 12, 2004]

COMPLAINT

Plaintiff Terry Spurgeon, as custodian for the benefit of James E. Spurgeon and on behalf of others similarly situated, states as follows for his Complaint against Pacific Life Insurance Company ("Pacific Life"):

THE PARTIES, JURISDICTION AND VENUE

1. Plaintiff Terry Spurgeon is a resident of Moro, Illinois, in Madison County.

2. At all times relevant to this Complaint, Plaintiff owned a Pacific Life Individual Flexible Premium Deferred Variable Annuity which he purchased for the benefit of his then-minor son, James E. Spurgeon pursuant to the Uniform Gifts to Minors Act.

3. Pacific Life is a California corporation with its principal place of business in Newport Beach, California.

4. Pacific Life is licensed to sell insurance products in Illinois, and at all times relevant to this Complaint, Pacific

Life has promoted, marketed, and sold insurance and variable annuities to the investing public nationwide, including in Madison County, Illinois.

5. Pacific Life maintains investor relationships with clients in Madison County, Illinois, communicates regularly with them by mail and maintains an interactive website to communicate with clients, including clients in Madison County.

6. The transactions which are the subject of this Complaint occurred in part in Madison County, Illinois.

7. This Court therefore has jurisdiction over Pacific Life pursuant to 735 ILCS § 5/2-209, and venue is proper in this County pursuant to 735 ILCS § 5/2-101.

PACIFIC LIFE'S VARIABLE ANNUITY FUNDS

8. Issuers of variable annuities like Pacific Life have marketed the advantages of long-term investment through variable annuities (such as professional management, diversification, insurance protection and tax deferral) over direct investment in securities.

9. A Pacific Life annuity, such as the Pacific Life Individual Flexible Premium Deferred Variable Annuity, is a contract between an investor and Pacific Life, in which the investor agrees to make at least one minimum premium payment to Pacific Life in return for a series of annuity payments at a later date.

10. The Pacific Life annuities which are the subject of this Complaint are those which consist of a "separate account" which keeps investors' assets separate from Pacific Life's assets, and each annuity's separate account is further divided into multiple sub-accounts. Each sub-account corresponds to a single mutual fund, and Pacific Life invests the assets of each sub-account in that sub-account's corresponding mutual fund. These mutual funds are maintained exclusively for variable annuity or variable life insurance products, although they often bear names very similar to those of retail mutual funds.

11. An investor may allocate his premium payment and accumulated proceeds in the variable annuity among one or more of the various sub-accounts.

12. Different Pacific Life annuities permit investment in some of the same sub-accounts, meaning that owners of different annuities may nevertheless be invested in the same sub-accounts.

13. When an investor allocates any portion of a premium payment or accumulated proceeds to a sub-account, Pacific Life credits that sub-account with sub-account "units."

14. Units in Pacific Life's sub-accounts can be traded, either by purchase or redemption, only once a day at 4:00 p.m. Eastern Time.

15. Sub-account units are sold at a price based upon the sub-account "unit value" (UV) plus applicable sales charges. Units of the sub-accounts may be redeemed at the UV less any redemption or surrender charges. The UV is the value of a single accumulation unit in a sub-account.

16. The number of accumulation units an investor receives is determined when he allocates some or all of a premium payment or accumulated proceeds to a sub-account. The number of units is determined by dividing the amount of the premium payment or accumulated proceeds allocated to the sub-account by the UV of one unit of that sub-account.

17. The initial UV of each sub-account was $10 on the trading day the sub-account began operations.

18. Pacific Life establishes a new daily UV for each sub-account once every trading day at the close of trading on the New York Stock Exchange at 4:00 p.m. Eastern Time.

19. Pacific Life establishes the daily UV for each sub-account by multiplying each sub-account's UV for the prior trading day by a "net investment factor."

20. The "net investment factor" equals the quotient obtained by dividing the per share value of the assets of that sub-account (A) as of the end of that valuation period by the net asset value per share of the corresponding mutual fund as of the end of the preceding valuation period (B), minus certain daily charges, fees and deductions (C) (*i.e.*, net investment factor = (A / B) - C). A valuation period is the period between a trading day and the immediately preceding trading day.

21. Because a sub-account's UV is based upon the per share value of the underlying mutual fund, the value of an investor's sub-account units is subject to change much the same way that the value of a mutual fund share changes each day. The value of an investor's sub-account units will fluctuate as the value of the corresponding mutual fund fluctuates.

22. The mutual funds in which Pacific Life invests sub-account assets are managed by fund managers with which Pacific Life contracts.

23. The fund managers handle the day-to-day tasks associated with managing an investment portfolio, such as investment management and valuation of the mutual fund's underlying portfolio of securities.

24. At the end of each trading day, the assets of the mutual fund are valuated, and a "net asset value" is established for the mutual fund. That net asset value is the same net asset value Pacific Life uses to establish the corresponding sub-account's daily UV.

PACIFIC LIFE'S SUB-ACCOUNTS' UNDERLYTNG PORTFOLIOS INCLUDE FOREIGN MUTUAL FUNDS

25. Some of the mutual funds in which the annuity sub-accounts are invested include in their portfolios securities which are traded in markets outside of the United States.

26. In valuing the assets of a mutual fund, the fund manager uses the last trade price in the home market of each of the securities in its portfolio. The home markets for such foreign securities include London, Paris, Frankfurt, Moscow, Singapore, Kuala Lumpur, Hong Kong, Taipei, Tokyo and Sydney. These markets are located in time zones that are five to fifteen hours ahead of Eastern Time.

27. Thus, a five to fifteen hour interval elapses between the close of the foreign securities markets and Pacific Life's calculation of its sub-account's UVs.

28. For example, the exchange located in Tokyo, Japan observes normal trading hours of 9:00 a.m. to 3:00 p.m. local time. Active trading of securities traded on this exchange ends, and closing prices for those securities are posted, at 3:00 p.m. local time (2:00 a.m. Eastern time). When the mutual fund calculates the value of its portfolio securities using closing prices from this exchange and Pacific Life sets its sub-account UV based upon those values, Pacific Life relies upon closing prices for securities traded on this exchange that have been static for 14 hours.

29. Studies of world financial markets have established associations between the value changes among various markets. There is a positive correlation between value movements in the U.S. markets and value movements in foreign markets. If the U.S. markets experience an upward movement in values, it can be predicted that Asian markets will move upward once trading begins the next day. The same upward movement can be predicted for European markets once trading begins the next day. Similarly, if the U.S. markets experience a downward movement in values, it can be predicted that Asian and Euro-

pean markets will move downward once trading begins the next day.

30. Studies also demonstrate that the greater th percentage increase or decrease in the value of U.S. markets, the more likely foreign markets will post corresponding value movements on the subsequent trading day. The probability that the value movements of foreign markets will follow the previous day's value movements in U.S. markets is directly correlated to the degree or extent of the value movement of U.S. markets.

PACIFIC LIFE EXPOSES INVESTORS TO MARKET TIMING TRADING

31. A significant portion of the underlying securities in the mutual fund portfolios associated with the Pacific Life sub-accounts are listed on foreign exchanges and trade during each market's respective session. The share values set by these mutual funds and used by Pacific Life in setting its UV do not take into account on a daily basis any price relevant information (such as value movements in the U.S. markets, changes in world equity market indices, changes in the value of American Depository Receipts (ADRs), and fluctuations in foreign currency futures markets) that has become available in the interval between the close of the foreign markets and the calculation of the UV. Such price relevant information impacts the valuation of the underlying securities in the mutual funds in which sub-account proceeds are invested and the subsequent calculation of the sub-accounts' UVs. Such price relevant information is significant because the final market prices of the foreign securities often have become stale and no longer accurately reflect the true current market value of the securities.

32. By failing to make daily adjustments based upon the direction and degree of correlations between movements in U.S. and foreign markets, changes in world equity market indices, changes in the value of ADRs, and fluctuations in foreign currency futures markets, and by

calculating sub-account UVs based upon the corresponding mutual funds' net asset values which, in turn, are based upon the stale prices of foreign securities in the mutual funds' portfolios, Pacific Life has exposed long-term annuity owners to market timing traders who regularly purchase and redeem units of Pacific Life's sub-accounts as part of a profitable, stale-price trading strategy.

33. Market timing trading strategy is a short-term trading strategy which takes advantage of the stale pricing of the foreign securities upon which the sub-accounts' UVs are based, enabling such traders to predict changes in the UVs as a result of price relevant events that occur after the close of foreign securities markets and before Pacific Life calculates the sub-accounts' daily UVs. Market timing traders are able to predict changes in sub-account UVs because of the positive directional and degree of correlations between movements in U.S. and foreign markets, changes in world equity market indices, changes in the value of ADRs, and fluctuations in foreign currency futures markets.

34. The stale price strategy of market timers who trade in units of Pacific Life's sub-accounts is to buy units on days when the U.S. markets move up and to redeem units when the U.S. markets move down. In order to derive maximum benefit from price relevant information developed subsequent to the now stale closing prices of the portfolio securities, market timers wait until the variable annuity's deadline for buying or redeeming units in Pacific Life's sub-accounts on any particular business day. Because Pacific Life cannot make an investment in the underlying mutual fund and the mutual fund cannot buy or sell the foreign securities in its underlying portfolio (due to the time difference between New York and the home markets of the foreign securities) at the time Pacific Life sets the daily UV, the units that Pacific Life issues to and redeems from market timers do not reflect the actual value of the foreign securities held in the portfolio of the corresponding mutual fund.

35. Due to Pacific Life's use of mutual fund net asset values which are based upon stale prices of foreign securities, market timers who buy Pacific Life's sub-account units on days when the U.S. markets move up are buying discounted units and thereby dilute the ownership interests of other sub-account holders because the sub-accounts' underlying foreign securities assets are undervalued as of the time of the unit purchase.

36. Due to Pacific Life's use of mutual fund net asset values which are based upon stale prices of foreign securities, market timers who redeem Pacific Life's units on days when the U.S. markets move down are redeeming units at a premium and thereby dilute the ownership interests of other sub-account holders because the underlying foreign securities assets are overvalued as of the time of the unit redemption.

37. The excess profits that market timing traders obtain take advantage of the stale pricing of Pacific Life's sub-accounts and dilute the ownership interests of other sub-account holders. When market timing traders buy units at stale, discounted prices, the ownership interests of other sub-account holders are diluted because the market timer has unfairly become, per unit, an equal sub-account owner with existing owners per unit. When market timing traders later redeem those units at a premium, the prior dilution of other sub-account holders' ownership interests is made permanent and, if the UV is then artificially inflated as a result of Pacific Life's UV calculation practices, may further dilute other sub-account holders' ownership interests. Long-term sub-account holders suffer a dilution in their ownership interests and the wealth represented by that diluted amount is transferred from them to market timing traders. Thus, the market timing trades capture an arbitrage profit that comes dollar-for-dollar out of the pockets of the investors.

CLASS ACTION ALLEGATIONS

38. Through his ownership of the Pacific Life Individual Flexible Premium Deferred Variable Annuity, Plaintiff at all times relevant to this Complaint held units in the Lazard International Value Fund sub-account for the purpose of long-term investment.

39. Plaintiff brings this class action on behalf of himself and on behalf of a class of all persons in the United States who, through their ownership of an Pacific Life annuity or insurance products, held units of any Pacific Life sub-account invested in mutual funds which included foreign securities in their portfolios and which experienced market timing trading activity. Excluded from the Class are Pacific Life and any of its parent, subsidiary or affiliated corporations, as well as any of their controlled persons, officers, directors, agents, servants or employees, and the immediate family members of any such person; any judge who may preside over this case; all persons who have claims in excess of $75,000; and any investor who engaged in market timing trading in the Pacific Life sub-accounts which are the subject of this Complaint.

40. Excluded from this Complaint are any claims based upon Pacific Life's conduct in connection with Plaintiff's or any class member's purchase or sale of any Pacific Life annuity product or units in any Pacific Life sub-account.

41. Plaintiff is a member of the Class and will fairly and adequately assert and protect the interests of the Class. Plaintiff's interests are coincident with, and not antagonistic to, those of other class members.

42. Plaintiff has retained attorneys who are experienced in class action litigation.

43. Members of the Class are so numerous and geographically dispersed that joinder of all members is impracticable. While Plaintiff cannot ascertain the exact number and identity of class members prior to discovery, on information and belief, there are thousands of class

members and their identity can be ascertained from Pacific Life's books and records.

44. There are questions of law or fact common to the Class.

45. Those common questions predominate over any questions affecting only individual members of the Class. Common questions include, but are not limited to, the following:

a. whether Pacific Life negligently failed to evaluate on a daily basis price relevant information available after the close of the exchanges in which the securities held by the mutual funds' portfolios trade, but before the setting of the daily UV, which was likely to change the value of the mutual fund securities and thus sub-account UVs;

b. whether Pacific Life negligently failed to implement valuation and pricing policies and procedures which account for price relevant events occurring after the close of the exchanges in which the securities held by the mutual funds' portfolios trade, but before the setting of the daily UV, when calculating the UV when closing prices of mutual fund portfolio securities did not reflect their true market values;

c. whether Pacific Life negligently failed to protect its sub-account holders from market timing trading;

d. whether Pacific Life breached its fiduciary obligations to Plaintiff and the Class by failing to evaluate on a daily basis price relevant information available after the close of the exchanges in which the securities held by the mutual funds' portfolios trade, but before the setting of the daily UV, which was likely to change the value of the mutual fund securities and thus sub-account UVs;

e. whether Pacific Life breached its fiduciary obligations to Plaintiff and the Class by failing to implement valuation and pricing policies and procedures

which account for price relevant events occurring after the close of the exchanges in which the securities held by the mutual funds' portfolios trade, but before the setting of the daily UV, when calculating the UV whenever closing prices of mutual fund portfolio securities did not reflect their true market values;

f. whether Pacific Life breached its fiduciary obligations to Plaintiff and the Class by failing to implement valuation and pricing policies that use price relevant information to value mutual fund portfolio securities and sub-account UVs whenever closing prices of the securities held by the mutual funds' portfolios did not reflect their true market values;

g. whether Pacific Life breached its fiduciary obligations to Plaintiff and the Class by failing to protect Pacific Life sub-account holders from market timing trading;

h. whether Plaintiff and the Class have sustained damages as a result of Pacific Life's conduct; and/or

i. the proper measure of any such damages.

46. The prosecution of separate actions by individual members of the Class would create a risk of:

a. inconsistent or varying adjudications with respect to individual members of the Class; and/or

b. adjudication with the respect to individual members of the class, which would, as a practical matter, be dispositive of the interests of other members not parties to the adjudication or substantially impair or impede their ability to protest their interest.

47. The class action method is appropriate for the fair and efficient prosecution of this action.

48. Individual litigation of all claims, which might be brought by all class members, would produce a multiplicity of cases so that the judicial system would be congested

for years. Class treatment, by contrast, provides manageable judicial treatment calculated to bring a rapid conclusion to all litigation of all claims arising from the conduct of Pacific Life.

COUNT I

49. Plaintiff repeats and incorporates by reference paragraphs 1 through 48 as if fully set forth herein.

50. Pacific Life directly or impliedly held itself out as a skilled specialist in the field of investment management, possessing the specialized knowledge, skill and care ordinarily used by reasonably well-qualified members of the investment management profession.

51. It thereby became Pacific Life's duty to exercise that degree of knowledge, skill and care ordinarily used, or which should be used, by reasonably well-qualified members of the investment management profession, including but not limited to the duties:

a. to use mutual fund share values predicated upon accurate market values when valuing sub-accounts and setting their daily UV's; and/or

b. to prevent market timing trading in sub-accounts to prevent the dilution of the ownership interests of long-term investors.

52. Pacific Life knew or should have known that the closing prices for the foreign securities held in its sub-accounts' corresponding mutual funds' portfolios did not represent accurate market values of those foreign securities whenever price relevant events had occurred after the closing of foreign securities markets but before Pacific Life's calculation of daily UVs.

53. Pacific Life was negligent in one or more of the following ways:

a. failing to evaluate on a daily basis price relevant information available to Pacific Life after the close

of foreign securities markets in which the underlying mutual funds' portfolios of securities traded;

b. failing to adjust calculation of the daily UV to take into account any changes in value of the foreign securities held in the underlying mutual funds' portfolios whenever price relevant events occurred after the closing of the foreign securities markets but before Pacific Life's calculation of daily UVs;

c. failing to implement Pacific Life's valuation and unit pricing policies and procedures;

d. using valuation and unit pricing policies and procedures which benefited market timing traders of Pacific Life's sub-accounts at the expense of long-term sub-account holders; and/or

e. by favoring certain investors and permitting them to engage in market timing trading at the expense of other investors, namely Plaintiff and the Class.

54. As a direct and proximate result of Pacific Life's negligence, Plaintiff and the Class have suffered damages in the amount to be proven at trial, but less than $75,000 per Plaintiff or Class member, including all compensatory damages and costs.

WHEREFORE, Plaintiff and the Class pray that the Court enter judgment in their favor and against PACIFIC LIFE INSURANCE COMPANY: ordering that this action be maintained as a class action pursuant to 735 ILCS § 5/2-801 and certifying an appropriate class; and awarding Plaintiff and the Class compensatory damages, attorney's fees, prejudgment interest, and costs of suit in an amount not to exceed $75,000 per plaintiff or class member. Plaintiff demands a trial by jury on all issues so triable.

COUNT II

55. Plaintiff repeats and incorporates by reference paragraphs 1 through 48 and 50 through 51 as if fully set forth herein.

56. Pacific Life knew or was recklessly indifferent to the fact that the closing prices for the foreign securities held in its sub-accounts' corresponding mutual funds' portfolios did not represent accurate market values of those foreign securities whenever price relevant events had occurred after the closing of foreign securities markets and before Pacific Life's calculation of the daily UVs.

57. Pacific Life knowingly or with utter indifference to and conscious disregard for the rights of Plaintiff and the Class willfully and wantonly engaged in one or more of the following acts or omissions:

a. failing to evaluate on a daily basis price relevant information available to Pacific Life after the close of foreign securities markets in which the underlying mutual funds' portfolios of securities traded;

b. failing to adjust calculation of the daily UV to take into account any changes in value of the foreign securities held in the underlying mutual funds' portfolios whenever price relevant events occurred after the closing of the foreign securities markets but before Pacific Life's calculation of daily UVs;

c. failing to implement Pacific Life's valuation and unit pricing policies and procedures;

d. using valuation and unit pricing policies and procedures which benefited market timing traders of Pacific Life's sub-accounts at the expense of long-term sub-account holders; and/or

e. by favoring certain investors and permitting them to engage in market timing trading at the expense of other investors, namely Plaintiff and the Class.

58. As a direct and proximate result of Pacific Life's foregoing conduct, Plaintiff and the Class have suffered damages in the amount to be proven at trial, but less than $75,000 per Plaintiff or Class member, including all compensatory damages and costs.

WHEREFORE, Plaintiff and the Class pray that the Court enter judgment in their favor and against PACIFIC LIFE INSURANCE COMPANY; ordering that this action be maintained as a class action pursuant to 735 ILCS § 5/2-801 and certifying an appropriate class; and awarding Plaintiff and the Class compensatory and punitive damages, attorney's fees, prejudgment interest, and costs of suit in an amount not to exceed $75,000 per plaintiff or class member. Plaintiff demands a trial by jury on all triable issues.

COUNT III

59. Plaintiff repeats and incorporates by reference paragraphs 1 through 48 and 50 through 51 as if fully set forth herein.

60. A special relationship existed between Pacific Life and Plaintiff and the Class as a result of the following:

a. Pacific Life is a stock corporation. The shareholders select the board of directors who will manage Pacific Life's assets, and the directors act as fiduciaries in managing Plaintiff's and Class' funds;

b. Pacific Life assumed a position of trust and confidence by servicing and managing Plaintiff's and class members' investments in Pacific Life annuities;

c. The calculation of the UV was within the exclusive control of Pacific Life;

d. Whether market timing was allowed to occur in the sub-accounts was within the exclusive control of Pacific Life;

e. Because Pacific Life's variable annuities were contracts of adhesion prepared by Pacific Life and not subject to negotiation, unequal bargaining power existed between Plaintiff and class members and Pacific Life;

f. Pacific Life and its agents held themselves out as highly-skilled insurance and financial experts, possessing the special knowledge and expertise needed to interpret and understand the complex and sophisticated daily management of annuity investments; and/or

g. Pacific Life is an insurer characterized by elements of public interest which subject it to more stringent standards of conduct than those normally arising out of contract.

61. As a result of the foregoing, Pacific Life was a fiduciary to Plaintiff and Class members, and Pacific Life owed Plaintiff and the Class certain fiduciary duties.

62. Pacific Life breached its fiduciary duties to Plaintiff and the Class in one or more of the following ways:

a. exposing Plaintiff's and the Class' ownership interests in the sub-accounts to dilution through market timing trading by failing to evaluate on a daily basis price relevant information available to Pacific Life after the close of foreign securities markets in which the underlying mutual funds' portfolios of securities traded;

b. exposing Plaintiff's and the Class' ownership interests in the sub-accounts to dilution through market timing trading by failing to adjust calculation of the daily UV to take into account any changes in value of the foreign securities held in the underlying mutual funds' portfolios whenever price relevant events occurred after the closing of the foreign securities markets but before Pacific Life's calculation of daily UVs;

c. exposing Plaintiff's and the Class' ownership interests in the sub-accounts to dilution through market timing trading by failing to implement Pacific Life's valuation and unit pricing policies and procedures;

d. exposing Plaintiff's and the Class' ownership interests in the sub-accounts to dilution through market timing trading by using valuation and unit pricing policies and procedures which benefited market timing traders of Pacific Life's sub-accounts at the expense of long-term sub-account holders;

e. by failing to provide complete and truthful information to Plaintiff and the Class regarding Pacific Life's allowance of market timing activities in Pacific Life sub-accounts;

f. by failing to provide complete and truthful information to Plaintiff and the Class regarding the dilution of their holdings due to Pacific Life's failure to use accurate market values of foreign securities held in the underlying mutual funds' portfolios when setting daily UV's; and/or

g. by favoring certain investors and permitting them to engage in market timing trading at the expense of other investors, namely Plaintiff and the Class.

63. As a direct and proximate result of Pacific Life's breaches of fiduciary duties, Plaintiff and the Class have suffered damages in the amount to be proven at trial, but less than $75,000 per plaintiff or class member, including all compensatory damages and costs.

WHEREFORE, Plaintiff and the Class pray that the Court enter judgment in their favor and against PACIFIC LIFE INSURANCE COMPANY; ordering that this action be maintained as a class action pursuant to 735 ILCS § 5/2-801 and certifying an appropriate class; and awarding Plaintiff and the Class compensatory and punitive damages, attorney's fees, prejudgment interest, and costs of suit in an amount not to exceed $75,000 per plaintiff or class member. Plaintiff demands a trial by jury on all issues so triable.

COUNT IV

64. Plaintiff repeats and incorporates by reference paragraphs 1 through 63 as if fully set forth herein.

65. Pacific Life's valuation and unit pricing policies and practices which are the subject of this Complaint were conceived and emanated from California.

66. Because Pacific Life is a California corporation with its principal place of business in California and because Pacific Life's valuation and unit pricing policies and practices which are the subject of this Complaint were conceived in and emanated from California, Pacific Life is subject to the provisions of Cal. Bus. & Prof. Code § 17200 *et seq.*

67. California Bus. & Prof. Code § 17200 prohibits any "unlawful . . . business act or practice." Pacific Life has violated Cal. Bus. & Prof. Code § 17200's prohibition against engaging in an unlawful act or practice by violating the common law as alleged in Counts I through III of this Complaint.

68. Plaintiff reserves the right to allege other violations of law, which constitute other unlawful business acts or practices. Such conduct is ongoing and continues to this date.

69. California Bus. & Prof. Code § 17200 also prohibits any "unfair . . . business act or practice." As detailed in the preceding paragraphs, Pacific Life engaged in conduct that is unfair within the meaning of Cal. Bus. & Prof. Code § 17200 *et seq.* Pacific Life's practices offend public policy and are unethical, oppressive, unscrupulous and violate the laws identified herein and the policies supporting those laws.

70. Pacific Life's conduct caused and continues to cause substantial injury to Plaintiff and Class members.

71. The justifications, if any, for Pacific Life's wrongful conduct were and are vastly outweighed by the adverse effects of such conduct.

72. Finally, there were reasonably available alternatives to Pacific Life to further its business interests, other than the acts and omissions described in this Complaint. As a result, Pacific Life engaged in unfair business practices prohibited by Cal. Bus. & Prof. Code § 17200 *et seq.*

73. California Bus. & Prof. Code § 17200 also prohibits any "fraudulent business act or practice." Pacific Life's acts and omissions, as more fully set forth elsewhere in this Complaint, were fraudulent within the meaning of Cal. Bus. & Prof. Code § 17200, and were likely to deceive the public, Plaintiff and Class members. Pacific Life's fraudulent conduct constitutes a fraudulent business act or practice within the meaning of Cal. Bus. & Prof. Code § 17200 *et seq.*

74. Pacific Life engaged in these unlawful, unfair and fraudulent business acts and practices with others who participated, in whole and in part, in the conduct alleged.

75. As a result of the foregoing conduct, Pacific Life and any co-participants have been unjustly enriched at the expense of plaintiff and Class members.

76. As a co-participant in the violation of Cal. Bus. & Prof. Code § 17200 *et seq.*, Pacific Life is jointly and severally liable for the restoration to any person of any and all money that has been acquired by means of the alleged violations of Cal. Bus. & Prof. Code § 17200 *et seq.*

77. The unlawful, unfair, and fraudulent business practices of Defendant described above present a continuing threat to members of the public in that Defendant continues to engage in the conduct described herein.

WHEREFORE, Plaintiff and the Class pray that the Court order that this action be maintained as a class action pursuant to 735 ILCS § 5/2-801 and certify an appropriate class; grant restitution to Plaintiff and the Class by

ordering Defendant PACIFIC LIFE INSURANCE COMPANY to return to Plaintiff and the Class all sums unlawfully and unfairly obtained from them as the result of Pacific Life's unfair and unlawful business practices in an amount not to exceed $75,000 per plaintiff or class member; and order Defendant PACIFIC LIFE INSURANCE COMPANY to pay to Plaintiffs and the Class all costs of suit, attorneys' fees, prejudgment interest and any other relief the Court deems appropriate under the circumstances in accordance with section 17200 of the California Business and Professions Code.

[attorney name and address blocks omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

Civil No. 03-CV-0673-DRH

T.K. PARTHASARATHY, EDMUND WOODBURY, STUART ALLEN SMITH, AND SHARON SMITH, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Plaintiffs,

v.

T. ROWE PRICE INTERNATIONAL FUNDS, INC., A CORPORATION, T. ROWE PRICE INTERNATIONAL, INC., ARTISAN FUNDS, INC., A CORPORATION, ARTISAN PARTNERS LIMITED PARTNERSHIP, AIM INTERNATIONAL FUNDS, INC., A CORPORATION, AND AIM ADVISORS, INC.,

Defendants.

[Filed Oct. 16, 2003]

Notice of Removal

Defendants T. Rowe Price International Funds, Inc., T. Rowe Price International Inc., AIM International Funds, Inc. and A I M Advisors, Inc., pursuant to 28 U.S.C. §§ 1441 and 1446(a), hereby give notice of their removal of this action from the Circuit Court of Madison County in the State of Illinois to the United States District Court for the Southern District of Illinois, and in support thereof state as follows:

1. The Summons and Complaint in this action were filed on September 16, 2003 in the Circuit Court of Madison County in the State of Illinois.

2. The Summons and Complaint were served on T. Rowe Price International Funds, Inc. and T. Rowe Price International, Inc. in Maryland and on AIM International Funds, Inc. and A I M Advisors, Inc. in Texas on September 23, 2003. No other defendant was served with a Summons and Complaint prior to that date. Copies of the Summons and Complaint are attached as Exhibit A. A Motion for Leave to Amend and a First Amended Complaint (hereinafter, sometimes, "Cplt.") were subsequently filed on October 3, 2003, pursuant to an Order of the Circuit Court of Madison County, dated October 3, 2003. Copies of the Motion, First Amended Complaint and Order are attached as Exhibit B.

3. Other than the filing and service of the Summons and Complaint and the First Amended Complaint and said Order, no activity has taken place in this action.

4. This Court has original jurisdiction over the subject matter of this action on any and all of the following grounds:

a. diversity of citizenship: this Court has jurisdiction over the subject matter of this action under 28 U.S.C. § 1332, in that (1) plaintiffs and defendants are (and were at the time of filing) citizens of different states; and (2) the amount in controversy exceeds the sum or value of $75,000, exclusive of interest and costs. As explained further below, the claims asserted in the First Amended Complaint are derivative claims, not individual claims, and, accordingly, the amount in controversy exceeds $75,000 exclusive of interest and costs.

b. federal question: further, if and to the extent that any portion of the claims asserted by plaintiffs are individual claims, they would be claims in connection with the purchase or sale of securities, and therefore exist only (if at all) under the federal securities laws. As provided in the Securities Litigation Uniform Standards Act of 1998, 15 U.S.C. § 78bb(f), there can be no state law class claims as to such matters, and any state court

action in which a plaintiff is attempting to assert such class claims is removable to federal court. Such claims present a federal question as to which this Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331. See also: 28 U.S.C. § 1441(b). In addition, this Court can and should, if necessary, exercise supplemental jurisdiction, pursuant to 28 U.S.C. §§ 1441(c) and 1367, as to any such claims that may exist under state law.

c. federal question: the Court also possesses jurisdiction over this action pursuant to Section 44 of the Investment Company Act of 1940, 15 U.S.C. § 80a-43, which vests the district courts of the United States with jurisdiction "of all suits in equity and actions at law brought to enforce any liability or duty created by . . . this subchapter or the rules, regulations, or orders hereunder" issued by the SEC. The claims asserted by plaintiffs are "rooted in" and preempted by federal law. The SEC comprehensively regulates the subject matter of this action, i.e. fair value pricing of mutual funds. Plaintiffs, themselves, recognize this point. See e.g. Cplt. paras. 63, 76, 89: "On or about January 1, 1965, applicable published regulations [of the SEC] expressly recognized that changes in trading prices of securities in the . . . Fund might occur daily after the closing of the New York Stock Exchange." Counts II, IV and VI of the First Amended Complaint are based on violation of these SEC regulations. The claims asserted by plaintiffs involve the interpretation and application of federal law, and thus (if they exist at all) present a federal question as to which this Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331. In addition, if and to the extent that Counts I, III and V allege state law claims, as noted above the Court can and should exercise supplemental jurisdiction as to those Counts, since the nucleus of alleged facts is the same as in Counts II, IV and VI.

5. Plaintiffs' action, although styled by them as a "class action", is actually a derivative action on behalf of the Funds in which they owned shares. Any injury allegedly suffered by the four plaintiffs derived from and was not distinct from the alleged injury suffered by the Fund in which he or she held shares. In the words of Judge Easterbrook, any injury suffered by any plaintiff was "mediated through" the Fund, and was not distinct from the injury suffered generally by all shareholders as owners of the Fund's shares.[1]

6. Plaintiffs' citizenship and defendants' states of incorporation or, in the case of a limited partnership, organization and principal places of business are (and were at the time of filing) as follows:

a. Plaintiffs

Plaintiffs T.K. Parthasarathy, Edmund Woodbury, and Stuart Allen Smith and Sharon Smith, according to the First Amended Complaint, are each citizens of the State of Illinois and investors, respectively, in Artisan International Fund, T. Rowe Price International Stock Fund, and AIM European Growth Fund. Cplt., paras. 1, 2, 3 and 4; and

b. Defendants

(1) Defendant T. Rowe Price International Funds, Inc. is a Maryland corporation with its principal place of business in Baltimore, Maryland. Cplt., para. 5.

(2) Defendant T. Rowe Price International, Inc. is a Maryland corporation with its principal place of business in Baltimore, Maryland. Cplt., caption.

(3) Defendant Artisan Funds, Inc. is a Wisconsin corporation with its principal place of business in Milwaukee, Wisconsin. Cplt., para. 7.

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[1] See Bagdon v. Bridgestone/Firestone, Inc., 916 F.2d 379, 381 (7th Cir. 1990).

(4) Defendant Artisan Partners Limited Partnership is a Delaware partnership with its principal place of business in Milwaukee, Wisconsin. Cplt., para. 8.

(5) Defendant AIM International Funds, Inc. is a Maryland corporation with its principal place of business in Houston, Texas. Cplt., para. 9.

(6) Defendant A I M Advisors, Inc. is a Delaware corporation with its principal place of business in Houston, Texas. Cplt., para. 10.

7. The amount in controversy in this derivative action easily exceeds $75,000. Plaintiffs claim that the damages of members of the "class" exceed $50,000 but are less than $75,000 per person (see Affidavit of Stephen M. Tillery, attached to Cplt.). This is erroneous. The T. Rowe Price International Stock Fund has over 490,000 shareholder accounts and over $4.8 billion in assets. The AIM European Growth Fund has over 60,000 shareholder accounts and over $425 million in assets. If plaintiffs' allegations are upheld, and the Funds have been mispriced, damages to the Funds would be far in excess of $75,000, especially since plaintiffs seek to recover damages for five years of alleged mispricing of the Funds. Cplt., para. 46.[2]

8. Accordingly, this action is removable pursuant to 28 U.S.C. §§ 1441 and 1446.

9. As required by 28 U.S.C. § 1446(d), a copy of this Notice of Removal is being served on the Clerk of the Circuit Court of Madison County in the State of Illinois and on Plaintiffs' Counsel.

10. The two defendants not represented by the undersigned counsel, Artisan Funds, Inc. and Artisan Partners Limited Partnership, have advised us that they will be

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[2] The assertion that damages are less than $75,000 appears to be made by Plaintiffs for the purpose of keeping this litigation in Madison County, rather than in the federal court where it belongs.

submitting separate papers of their own in support of removal.

Wherefore, defendants T. Rowe Price International Funds, Inc., T. Rowe Price International, Inc., AIM International Funds, Inc. and A I M Advisors, Inc. pray that this action be removed to the United States District Court for the Southern District of Illinois.

Dated: October 16, 2003

[attorney name and address blocks omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

Civil No. 03-CV-0673-DRH

T.K. PARTHASARATHY, EDMUND WOODBURY, STUART ALLEN SMITH, AND SHARON SMITH, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Plaintiffs,

v.

T. ROWE PRICE INTERNATIONAL FUNDS, INC., A CORPORATION, T. ROWE PRICE INTERNATIONAL, INC., ARTISAN FUNDS, INC., A CORPORATION, ARTISAN PARTNERS LIMITED PARTNERSHIP, AIM INTERNATIONAL FUNDS, INC., A CORPORATION, AND AIM ADVISORS, INC.,

Defendants.

[Filed Oct. 23, 2003]

CONSENT TO REMOVAL

Pursuant to 28 U.S.C. §§ 1441 and 1446, defendants Artisan Funds, Inc. and Artisan Partners Limited Partnership (sometimes referred to collectively as the "Artisan Defendants") hereby consent to the removal of the above-captioned action from the Circuit Court of the Third Judicial Circuit, Madison County, Illinois, to the United States District Court for the Southern District of Illinois, and in support of such removal state as follows:

1. Defendant Artisan Funds, Inc. is a corporation organized under the laws of the State of Wisconsin with its principal place of business in Milwaukee, Wisconsin.

2. Defendant Artisan Partners Limited Partnership is a limited partnership organized under the laws of the

State of Delaware with its principal place of business in Milwaukee, Wisconsin. The general and limited partners of Artisan Partners Limited Partnership are individuals, trusts, partnerships, limited liability companies and corporations, each of which (or, in the case of such trusts, partnerships and limited liability companies, their respective trustees, partners and/or members) are citizens of the States or foreign states set forth in Exhibit A hereto. As appears from Exhibit A, none of such general and limited partners of Artisan Partners Limited Partnership are citizens of the State of Illinois.

3. The Amended Complaint alleges that plaintiff T.K. Parthasarathy is a shareholder of Artisan International Fund, a series of Artisan Funds, Inc. (Am. Compl. ¶ 11.) As of the date of the filing of this action, there were more than 200,000 beneficial owners of shares in Artisan International Fund, over 500 million shares outstanding, and over $9 billion in Fund assets.

4. The earliest date on which either of the Artisan Defendants was served with Summons or Complaint in this action was September 23, 2003, when Summons and Complaint were first served on defendant Artisan Partners Limited Partnership. Defendant Artisan Funds, Inc. purportedly was served with Summons and Complaint on September 24, 2003. Copies of the Summons directed to the Artisan Defendants are attached hereto as Exhibits B and C.

5. On October 16, 2003, defendants T. Rowe Price International Funds, Inc., T. Rowe Price International, Inc., AIM International Funds, Inc. and AIM Advisors, Inc. filed a Notice of Removal removing this action from the Circuit Court of the Third Judicial Circuit, Madison County, Illinois, to this Court (the "Notice of Removal"). Copies of plaintiffs' Complaint, a Motion for Leave to Amend filed by plaintiffs on or about October 3, 2003, an Order of the Circuit Court of the Third Judicial Circuit dated October 3, 2003 granting plaintiffs' motion, and

plaintiffs' First Amended Complaint, are attached as exhibits to the Notice of Removal.

6. The foregoing Summons and the referenced exhibits to the Notice of Removal constitute all process, pleadings and orders served upon or received by the Artisan Defendants while this action was pending in the Circuit Court of the Third Judicial Circuit.

7. As set forth in the Notice of Removal, this action is removable to this Court pursuant both to 28 U.S.C. § 1441(a) and 28 U.S.C. § 1441(b):

a) This Court has original jurisdiction over the subject matter of this action under 28 U.S.C. § 1332. Plaintiffs and defendants are (and were at the time of filing) citizens of different states, and the amount in controversy exceeds the sum or value of $75,000, exclusive of interest and costs. The claims asserted in the Complaint and Amended Complaint are derivative in nature, not direct claims, and, as such, the amount in controversy as to each defendant exceeds $75,000, exclusive of interest and costs.

b) If and to the extent any portion of the claims asserted by plaintiffs could be deemed to be direct claims, they are removable to this Court under the Securities Litigation Uniform Standards Act of 1998, 15 U.S.C. §§ 77p, 78bb(f) ("SLUSA"). *See also* Section 27 of the Securities Exchange Act of 1934, 15 U.S.C. § 78aa (vesting exclusive jurisdiction in federal courts over actions brought for violations of the Securities Exchange Act of 1934 or of rules and regulations thereunder). Such claims present (if anything) a federal question as to which this Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331.

c) Independent of the existence of diversity jurisdiction and jurisdiction under SLUSA, the Court has jurisdiction over this action in its entirety under 28 U.S.C. § 1331 in that plaintiffs' action is founded on and rooted in preeminent federal law, specifically,

the Investment Company Act of 1940, 15 U.S.C. § 80a-1, *et seq.*, and the rules and regulations promulgated thereunder by the Securities and Exchange Commission (the "SEC"). Pursuant to Section 44 of the Investment Company Act of 1940, 15 U.S.C. § 80a-43, the Court possesses jurisdiction over "all suits in equity and actions at law brought to enforce any liability or duty" created by the Act or by "the rules, regulations, or orders" issued by the SEC thereunder.

d) Because the Court has original jurisdiction in this action, it can and should exercise supplemental jurisdiction as to any direct claims that may exist under state law pursuant to 28 U.S.C. § 1367 and 28 U.S.C. § 1441(c).

8. Wherefore, defendants Artisan Funds, Inc. and Artisan Partners Limited Partnership hereby consent to the Notice of Removal and to the removal of this action from the Circuit Court of the Third Judicial Circuit, Madison County, Illinois, to the United States District Court for the Southern District of Illinois.

Dated: October 23, 2003

[attorney name and address blocks omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

Civil No. 03-CV-691-DRH

CARL KIRCHER AND ROBERT BROCKWAY,
INDIVIDUALLY AND ON BEHALF OF ALL OTHERS
SIMILARLY SITUATED,
Plaintiffs,

v.

PUTNAM FUNDS TRUST, A BUSINESS TRUST,
PUTNAM INVESTMENT MANAGEMENT, LLC,
EVERGREEN INTERNATIONAL TRUST, A BUSINESS TRUST, AND
EVERGREEN INVESTMENT MANAGEMENT COMPANY, LLC,
Defendants.

[Filed Oct. 23, 2003]

NOTICE OF REMOVAL

To: All Counsel on the Attached Service List

PLEASE TAKE NOTICE that, pursuant to 28 U.S.C. §§ 1441 and 1446 and the applicable provisions of the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"), defendants Putnam Funds Trust and Putnam Investment Management, LLC (collectively, "Putnam") and defendants Evergreen International Trust and Evergreen Investment Management Company, LLC (collectively, "Evergreen") hereby remove the above-captioned action from the Circuit Court of Madison County, Illinois to the United States District Court for the Southern District of Illinois.[1] This action is removable under SLUSA

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[1] There is no legal or contractual relationship between the Putnam defendants and the Evergreen defendants, nor any apparent reason

because it is a "covered class action" alleging fraud in connection with the purchase or sale of "covered securities," as those terms are defined by SLUSA. The action also is removable on the ground that it presents a "substantial federal question" in that any duties defendants had with respect to the pricing of shares of their mutual funds arose exclusively under the federal securities laws, and plaintiffs have available remedies under the federal securities laws.

Background of the Action and Plaintiffs' Allegations

1. On September 16, 2003, plaintiffs commenced the above-captioned action in the Circuit Court of Madison County, Illinois.

2. Defendants Evergreen International Trust and Evergreen Investment Management Company, LLC were served with copies of the Summons and Complaint on September 24, 2003. Defendants Putnam Funds Trust and Putnam Investment Management, LLC were served with copies of the Summons and Complaint on September 29, 2003. A copy of all process, pleadings and orders served upon defendants in the state court action are attached hereto as Exhibit A. All defendants consent to removal and this Notice of Removal has been filed within thirty days of service of the Summons and Complaint on the first-served defendant.

3. The Complaint concerns the manner in which Putnam and Evergreen allegedly determined the prices at which shares of respectively, the Putnam International Growth & Income Fund and the Evergreen International Growth Fund (collectively, the "Funds") would be sold to the investing public. Specifically, plaintiffs allege that:

(a) the Funds are open-end mutual funds whose shares are sold to investors at prices based upon the net asset value ("NAV") per share plus applicable sales charges. (Compl. ¶ 13);

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why the claims against these separate groups of defendants have been brought in one action.

(b) investors may redeem their shares at the NAV of the shares less any redemption charges. (Compl. ¶ 13);

(c) defendants recalculate the NAV of the Funds' shares once each business day at the close of trading on the New York Stock Exchange (the "NYSE") at 4:00 p.m. Eastern Time and report the NAVs to the National Association of Securities Dealers (the "NASD") for dissemination to the public. (Compl. ¶ 15);

(d) securities issued by non-U.S. companies are a significant portion of each Fund's portfolio. (Compl. ¶ 16);

(e) the foreign exchanges on which the Fund's non-U.S. securities are traded close from five to fifteen hours ahead of Eastern Standard Time. (Compl. ¶ 16);

(f) there is a positive correlation between price movements in the U.S. market and those in the foreign markets such that it is possible to predict the next-day movement of prices in the foreign markets based on the performance of the U.S. market. (Compl. ¶ 17);

(g) despite the fact that the prices of the foreign securities held by the Funds are "stale' as of 4:00 p.m. Eastern Time, when the Funds calculate their NAVs, and despite the correlation between price movements in the U.S. market and future price movements in the foreign markets, the Funds use the last trade price in the home market for each of their foreign securities when calculating daily NAVs. (Compl. ¶ 16, 17, 20).[2]

4. Plaintiffs contend that defendants' alleged pricing practices for non-U.S. securities "have exposed long term shareholders to market timing traders who regularly purchase and redeem Defendant's shares as part of a profit-

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[2] Defendants do not concede the truth of plaintiffs' allegations regarding their policies or practices in pricing foreign securities for purposes of determining the Funds' daily NAVs.

able trading strategy." (Compl. ¶ 33). According to plaintiffs,

(a) "market timers who buy Defendants' shares on days when the United States market moves up are buying discounted shares at the expense of other fund shareholders because the funds' underlying foreign securities are undervalued as of the time of the share purchase." (Compl. ¶ 34); and

(b) "market timers who sell (redeem) Defendants' shares on days when the United States market moves down are selling (redeeming) shares at a premium at the expense of other fund shareholders because the underlying foreign securities are overvalued as of the time of the sale (redemption). (Compl. ¶ 35).

5. Plaintiffs claim the activities of the market timers result in dilution of the value of their shares and a transfer of wealth from the long-term buy-and-hold shareholders to the market timers. (Compl. ¶¶ 37, 38.).

6. Based on these allegations, plaintiffs assert two separate counts against each defendant:

(a) In Counts I and III of the Complaint, plaintiffs contend that Putnam and Evergreen, respectively, knew or were negligent in not knowing that the closing prices for the foreign securities used to calculate daily NAVs did not reflect their "fair value" (Compl. ¶ 56, 68) and that defendants breached their fiduciary duties to plaintiffs by:

(i) "failing to properly evaluate on a daily basis whether a significant event affecting the value of [the respective Fund's] portfolio of securities had occurred after the foreign trading markets for such securities had closed but before Defendants calculated NAV and share prices" (Compl. ¶¶ 56(i), 68(i));

(ii) "failing to implement [the respective Fund's] portfolio valuation and share pricing policies and procedures" (Compl. ¶¶ 56(ii), 68(ii)); and

(iii) "allowing portfolio valuation and share pricing policies and procedures which benefitted market timing traders of [the respective Fund's] shares at the expense of long term shareholders. (Compl. ¶¶ 56(iii), 68(iii)).

(b) In Counts II and IV of the Complaint, plaintiffs contend that Putnam and Evergreen, respectively, acted "with utter indifference and conscious disregard" for plaintiffs' investments and "willfully and wantonly" breached their duties to plaintiffs (Compl. ¶¶ 60, 73) by:

(i) "failing to know and implement applicable rules and regulations concerning the calculation of NAV" (Compl. ¶¶ 60(i), 73(i));

(ii) "failing to properly evaluate on a daily basis whether a significant event affecting the value of [the respective Fund's] portfolio of securities had occurred after the foreign trading markets for such securities had closed but before Defendants calculated NAV and share prices" (Compl. ¶¶ 60(ii), 73(ii));

(iii) "failing to implement [the respective Fund's] portfolio valuation and share pricing policies and procedures" (Compl. ¶¶ 60(iii), 73(iii)); and

(iv) "allowing portfolio valuation and share pricing policies and procedures which benefitted market timing traders of [the respective Fund's] shares at the expense of long term shareholders. (Compl. ¶¶ 60(iv), 73(iv)).

7. Plaintiffs purport to bring this action on behalf of themselves and a putative class consisting of "all persons in the United States who have owned shares in Putnam International Growth and Income [Fund] or Evergreen International Growth [Fund] for more than fourteen days from the date of purchase to the date of sale (redemption) or exchange ('long term shareholders')." (Compl. ¶ 41). Plaintiff asserts that the class period begins five years before the date of filing of the Complaint and continues through the date on which the Complaint was filed. (*Id.*)

Grounds for Removal Under SLUSA

8. In 1998 Congress enacted SLUSA, Pub. L. No 105-353, to prevent securities class action plaintiffs from evading the heightened pleading standards of the Private Securities Litigation Reform Act of 1995 (the "PSLRA"), and the PSLRA's mandatory stay of discovery pending resolution of a motion to dismiss, by filing securities class actions in state courts. *Lander v. Hartford Life & Annuity Ins. Co.*, 251 F.3d 101, 107-08 (2d Cir. 2001). SLUSA amended the Securities Act of 1933 (the "1933 Act") and the Securities Exchange Act of 1934 (the "1934 Act"). Those amendments are codified at 15 U.S.C. § 77p(b) and (c) and 15 U.S.C. § 78bb(f)(1) and (2), respectively.[3]

9. SLUSA's amendments to the 1934 Act provide, in pertinent part:

> (1) Class action limitations
>
> No covered class action based upon the statutory or common law of any State or subdivision thereof may be maintained in any State or Federal Court by any private party alleging –
>
> (A) a misrepresentation or omission of material fact in connection with the purchase or sale of a covered security; or
>
> (B) that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security.
>
> (2) Removal of covered class actions
>
> Any covered class action brought in any State court involving a covered security, as set forth in paragraph (1), shall be removable to the Federal district court for the district in which the action is pending, and shall be subject to paragraph (1).

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[3] Citations herein are to the applicable provisions of the 1934 Act, as amended by the SLUSA.

15 U.S.C. § 78bb(f).

10. SLUSA thus makes federal courts the exclusive venue for "covered class actions" alleging fraud in connection with the purchase or sale of "covered securities" and mandates that such class actions be governed exclusively by federal law. *Lander*, 251 F.2d at 108; *see also* H.R. CONF. REP. NO. 105-803, at 13 (1998) (stating that SLUSA "establishes uniform rules for securities class action litigation involving our national capital markets" and that "class actions relating to a 'covered security' . . . alleging fraud or manipulation must be maintained pursuant to the provisions of Federal securities law, in Federal court").

11. Despite plaintiffs' attempt to avoid removal under SLUSA by couching their Complaint as a state-law breach of fiduciary duty suit on behalf of "owners" of shares of the Funds, a careful examination of plaintiffs' allegations shows that this case falls squarely within the contours of SLUSA.

12. **Covered Class Action.** An action is a "covered class action" for purposes of SLUSA if it involves common questions of law or fact that predominate over any individual questions and is brought (i) on behalf of more than 50 persons or prospective class members or (ii) on a representative basis by one or more parties suing on behalf of themselves and other unnamed parties similarly situated. 15 U.S.C. § 78bb(f)(5)(B). This action is a "covered class action" within the meaning of SLUSA because the two named plaintiffs purport to bring this action on behalf of themselves and all others similarly situated (Compl. p. 1) and allege that "[c]ommon questions of law or fact predominate over any questions affecting only individual members of the Class." (Compl. ¶ 13).

13. **Covered Securities.** A "covered security" for purposes of SLUSA is one that meets the definition of a "covered security" provided in § 18(b) of the 1933 Act, 15 U.S.C. § 77r(b), at the time the misrepresentation, omission, manipulative act or deceptive conduct is alleged to

have occurred. 15 U.S.C. § 78bb(f)(5)(E). The 1933 Act's definition of "covered securities" includes "a security issued by an investment company that is registered, or that has filed a registration statement, under the Investment Company Act of 1940." 15 U.S.C. § 77r(b)(2). The shares of both the Putnam International Growth and Income Fund and the Evergreen International Growth Fund are "covered securities" within the meaning of SLUSA because the shares are issued by investment companies registered under the Investment Company Act of 1940.

(a) As set forth in note 1 to the financial statements in the Putnam International Growth and Income Fund's Annual Report for its fiscal year ended June 30, 2003 (available at Putnam's Website at www.putnam.com): "Putnam International Growth and Income Fund ("the fund") is a series of Putnam Funds Trust ("the trust") which is registered under the Investment Company Act of 1940, as amended, as a diversified, open-end management investment company."

(b) As set forth in note 1 to the financial statements in the Evergreen International Growth Fund's Annual Report for its fiscal year ended October 21, 2002 (available at Evergreen's Website at www.evergreeninvestments.com): "Evergreen International Growth Fund (the "Fund") is a diversified series of Evergreen International Trust (the "Trust"), a Delaware business trust organized on September 18, 1997. The Trust is an open-end management investment company registered under the Investment Company Act of 1940, as amended (the "Act").

14. **Alleged Misrepresentations and Omissions of Material Fact.** Plaintiffs allege that defendants "promoted, marketed, and sold shares [of their respective Funds] to the investing public nationwide." (Compl. ¶¶ 3, 5). Plaintiffs claim that defendants marketed the Funds as having "*the stated goal* of providing long term capital growth to investors who hold shares of the [Funds]." (Compl. ¶¶ 50, 63, emphasis added). Plaintiffs, in essence, contend that this "stated goal" was false because,

according to plaintiffs, defendants' practices in calculating the daily NAVs of the Funds' shares "have exposed long term shareholders to market timing traders" (Compl. ¶ 33) and have resulted in a "transfer of wealth from the non-trading long term buy and hold shareholders to the market timing traders ... through dilution." (Compl. ¶ 37).

15. Plaintiffs further allege that defendants publicly reported the allegedly "artificially inflated" or "artificially deflated" NAVs to the Funds' shareholders and the investing public by reporting the calculated NAVs each day to the NASD for dissemination to the public (Compl. ¶ 15), and through defendants' interactive Websites, which defendants allegedly use to communicate with shareholders regarding the performance of the Funds and the Funds' investments. (Compl. ¶¶ 4, 6).

16. By contending that defendants misrepresented that the Funds were appropriate for long-term buy-and-hold investors and misrepresented the NAVs of the Funds' shares plaintiffs have alleged that defendants misrepresented and omitted material facts concerning plaintiffs' investments and the value of the Funds' shares.

17. **Alleged Manipulative Device or Contrivance.** Even if plaintiffs had not alleged any misrepresentations or omissions of material fact, SLUSA does not apply *only* where there are alleged misrepresentations or omissions of material facts. Rather, SLUSA *also* applies to class actions alleging that "the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security." 15 U.S.C. 78bb(f)(1)(B).[4]

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[4] The language of SLUSA tracks the language of § 10(b) of the 1934 Act, 15 U.S.C. § 78j(b), which makes it unlawful for any person, in connection with the purchase or sale of a security, to use or employ "any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors." Securities and Exchange Commission ("SEC") Rule 10b-5, 17

18. The essence of plaintiffs' Complaint is that the defendants engaged in *manipulation* of the Funds' share prices in that they allegedly caused the share prices to be artificially inflated or deflated at various times by not adjusting the NAVs, which they allegedly determined by using the last trade prices on the foreign markets, for "significant events" occurring subsequent to the close of those markets and prior to 4:00 p.m. Eastern Time. (Compl. ¶¶ 56(i), 60(ii), 68(i), 73(ii)). The United States Supreme Court's decision in *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462 (1977), leaves no doubt that defendants' alleged actions constitute "manipulation" within the meaning of § 10(b) of the 1934 Act. In *Santa Fe* the Supreme Court explained:

> Manipulation is "virtually a term of art when used in connection with securities markets." . . . The term refers generally to practices, such as wash sales, matched orders, or rigged prices, that are intended to mislead investors by artificially affecting market activity.

Id. at 476 (emphasis added, citing *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 199 (1976) and 15 U.S.C. § 78i).

19. Thus, the fact that plaintiffs have styled their Complaint as one for alleged breach of fiduciary duties, rather than as a misrepresentation or omission action, does not take this case outside the ambit of the federal securities laws and the removal provisions of SLUSA governing securities class actions. *See, e.g., Denton v. H&R Block Fin. Advisors, Inc.*, 2001 U.S. Dist. LEXIS 15831, at *10 (N.D. Ill. Oct. 3, 2001) ("While it is true that allega-

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C.F.R. § 240. Rule 10b-5, promulgated under § 10(b) of the 1934 Act, makes it unlawful for any person, in connection with the purchase or sale of a security "(a) to employ any device, scheme or artifice to defraud, (b) to make any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or (c) to engage in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person."

tions of breach of fiduciary duty alone will not sufficiently plead a securities fraud claim, a breach of fiduciary duty may give rise to a Rule 10b-5 claim where the alleged conduct 'can fairly be viewed as manipulative or deceptive within the meaning of the [Securities Act].'") (Kocoras, Chief Judge) (citing *Santa Fe*, holding that alleged claim for breach of fiduciary duty was preempted by SLUSA and properly removed to federal court, and dismissing the action).[5]

20. **In Connection With the Purchase of Sale of a Security.** SLUSA only preempts claims alleging misrepresentations or omissions of material facts or manipulative or deceptive devices or contrivances that occur "in connection with the purchase or sale" of covered securities. 15 U.S.C. § 88bb(f)(1)(A) and (B) (emphasis added).

21. In an effort to plead around SLUSA's "purchase or sale" requirement, plaintiffs define the proposed class to include "all persons in the United States who *have owned* shares in Putnam International Growth and Income [Fund] or Evergreen International Growth [Fund] for more than fourteen days from the date of purchase to the date of sale (redemption) or exchange ('long term shareholders')." (Compl. ¶ 41, emphasis added). Plaintiffs' attempt at artful pleading is unavailing. To avoid removal under SLUSA plaintiffs would have to define the class to include *only* those persons who held shares of the Funds at the beginning of the 5-year class period and continued to hold those shares as of the end of the 5-year class period. The class as defined, however, *also* includes (i) persons who held shares of the Funds at the beginning of the 5-year class period and continued to hold the shares for at least 14-days before selling them during the class period; (ii) persons who purchased shares during 5-year class period and continued to hold them throughout the entire class period and (iii) persons who purchased shares dur-

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[5] District court cases are cited herein by way of example of analysis in similar cases.

ing the class period and held them for at least 14-days before selling them during the class period.

22. SLUSA applies where the class as defined by plaintiffs *necessarily* includes purchasers and/or sellers of a covered security. *See, e.g., Riley v. Merrill Lynch, Pierce, Fenner & Smith*, 292 F.3d 1334, 1345 (11th Cir. 2002) ("[W]hen a claim that sweeps within its ambit actual purchases and sales of securities is covered by SLUSA, a plaintiff may not avoid SLUSA's restrictions simply by alleging that a given misrepresentation caused him both to purchase and hold a particular security."); *Professional Mgmt. Assocs., Inc. v. KPMG LLP*, 335 F.3d 800, 803 (8th Cir. 2003) (where a complaint implicitly alleges that misrepresentations and omissions were made in connection with the purchase of securities, the plaintiff "cannot avoid preemption by asserting it is only claiming damages suffered as a result of holding its stock"); *Hardy v. Merrill Lynch, Pierce, Fenner & Smith*, 189 F. Supp. 2d 14, 18 (S.D.N.Y. 2001) (finding claims preempted by SLUSA where the class definition necessarily included persons who purchased their shares after Merrill Lynch made allegedly misleading statements, even though class also included persons who already held shares at the time the alleged misstatements were made).

23. The misstatements and omissions of material fact and manipulative practices alleged by plaintiffs also meet SLUSA's requirement that they have been made or occurred "in connection with" the purchases and sales of a covered security. SLUSA does not define the phrase "in connection with"; however, the identical phrase is used in § 10(b) of the 1934 Act and courts construing SLUSA have looked to case law under the 1934 Act in interpreting this phrase. *See, e.g., Falkowski v. Imation Corp.*, 309 F.3d 1123, 1129 (9th Cir. 2002) (noting that because SLUSA employs language identical to the language of the 1933 and 1934 Acts, "it is logical to look to case law under the 1933 and 1934 Acts as a starting point for interpreting the phrase 'in connection with the purchase or sale'").

24. To satisfy the "in connection with" requirement for purposes of a § 10(b) claim, a plaintiff need only show that he suffered injury as a result of deceptive practices "touching" his purchase or sale of securities. *Superintendent of Ins. of New York v. Bankers Life & Cas. Co.*, 404 U.S. 6, 12-13 (1971). The Supreme Court repeatedly has held that this requirement must be construed "'not technically and restrictively, but flexibly'" in order to promote § 10(b)'s remedial purpose. *See Affiliated Ute Citizens of Utah v. Unites* [*sic*] *States*, 406 U.S. 128, 151 (1972) (quoting *SEC v. Capital Gains Research Bureau*, 375 U.S. 180, 186 (1963)).

25. As plaintiffs allege, shares of open end mutual funds such as the Putnam International Growth and Income Fund and the Evergreen International Growth Fund are "*sold to investors such as Plaintiffs* at a price based upon the net asset value ('NAV') per share plus applicable sales charges" and redeemed (bought back by the Fund) "at the NAV of the shares less any redemption charges." (Compl. ¶ 13, emphasis added). Class members who bought shares of the Funds at times when the NAVs purportedly were "artificially inflated" as a result of defendants' alleged pricing practices, and class members who sold shares at times when the NAVs purportedly were "artificially deflated" as a result of defendants' alleged pricing practices, would have suffered monetary damages as a result as a result of alleged manipulative practices that "touched" their purchases and sales of shares of the Funds. Plaintiffs' allegations, therefore, meet the "in connection with" requirement of § 10(b) and SLUSA.

26. In sum, plaintiffs have alleged misrepresentations and omissions of material fact and/or fraudulent devices or contrivances by defendants in connection with the purchases and sales of class members who purchased and/or sold shares of the Funds during the alleged class period. Plaintiffs' claims fall squarely within the four comers of SLUSA and, therefore, are preempted – notwithstanding plaintiffs' attempt to artfully plead their securities class action claims as state-law claims. For these reasons, re-

moval under SLUSA is proper and any motion by plaintiffs to remand should be denied.[6]

Grounds for Removal on the Basis That the Complaint Presents a Substantial Federal Question

27. The artful pleading exception to the well-pleaded complaint rule applies not only where Congress has expressly preempted a field, but also where a plaintiff's complaint presents a "substantial federal question." *Lippitt v. Raymond James Fin. Servs., Inc.*, 340 F.3d 1033, 1041 (9th Cir. 2003) (certain internal citations omitted).

28. Plaintiffs contend that defendants breached their duties to the class by "failing to know and implement applicable rules and regulations concerning the calculation of NAV." (Compl. ¶¶ 60(i), 73(i)). However, defendants' duties with respect to the pricing of the Funds' shares arose *exclusively* under federal law. Specifically, SEC Rule 2a-4(a)(1), 17 C.F.R.270.2a-4(a)(1), promulgated under § 2(a)(41) of the Investment Company Act of 1940, 15 U.S.C. § 80a-2(a)(41), provides that "[p]ortfolio securities with respect to which market quotations are readily available shall be valued at current market value, and other securities and assets shall be valued at fair value as determined in good faith by the board of directors of the registered company." Indeed, plaintiffs allude to Rule 2a-4(a)(1) in paragraphs 59 and 72 of their Complaint, wherein they allege that applicable regulations governing the pricing of the shares of the Funds were published on or about January 1, 1965.[7]

29. Furthermore, how registered investment companies should price the shares of foreign companies under SEC Rule 2a-4 presents a substantial, *disputed* question of federal law. Plaintiffs contend that these shares should

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[6] SLUSA would not prevent the two named plaintiffs from asserting their purported state law claims on an individual basis; rather, it only preempts their ability to assert these claims on a class basis.

[7] SEC Rule 2a-4 was published in the Federal Register on December 30, 1964. *See* 29 FR 19101.

be priced at "fair value" rather than at their last trading price as of the close of the foreign exchange. (Compl. ¶ 17). However, in a 2001 letter to the Investment Company Institute, the SEC noted that "funds generally calculate their NAVs by using the closing prices of portfolio securities on the exchange or market (whether foreign or domestic) on which the securities principally trade." 2001 SEC No-Act LEXIS 543, at *3-4 (Apr. 30, 2001). The SEC further noted that "the closing prices of foreign securities may not reflect their market values at a fund's NAV calculation if an event that will affect the value of those securities ("significant event") has occurred since the closing prices were established on the foreign exchange or market, but before the fund's NAV calculation." *Id.* The SEC, therefore, concluded that if a fund determines that a "significant event" has occurred since the closing of the foreign market but before calculation of the fund's NAV, the fund must value the foreign security pursuant to a fair value pricing methodology. *Id.* at *8. Notably, however, the SEC declined to define what constitutes a "significant event" requiring "fair value pricing" of foreign securities. *Id.* at *10-11.

30. The issue of what constitutes a "significant event" requiring "fair value pricing" of foreign shares held in a mutual fund's portfolio implicates important federal interests. Indeed, Congress repeatedly has indicated its intent that nationally marketed securities should be governed by *uniform standards*. *See, e.g., Patneaude v. Equitable Life Assurance Soc'y*, 290 F.3d 1020, 1026 (9th Cir. 2002) (explaining that the PSLRA, the National Securities Markets Improvements Act of 1996, and SLUSA, "demonstrate that Congress intended to provide national, uniform standards for securities markets and nationally marketed securities"). Accordingly, the issue of how mutual funds should price the shares of foreign securities under SEC Rule 2a-4 should be decided by the federal courts, not the various state courts. *Cf. D'Alessio v. NYSE, Inc.*, 258 F.3d 93 (2d Cir. 2001) (holding that claims "arose under" federal law where claims were predi-

cated on alleged breached of certain duties imposed on the NYSE by the 1934 Act and would require a court to interpret federal law governing securities trading on a national exchange); *see also, e.g., Sparta Surgical Corp. v. NASD, Inc.*, 159 F.3d 1209, 1212 (9th Cir. 1998) ("[A]lthough Sparta's theories are posited as state law claims, they are founded on the defendants' conduct in suspending trading and de-listing the offering, the propriety of which must be exclusively determined by federal law.") The Seventh Circuit, interpreting the Supreme Court's decision in *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804 (1986), has held that for a complaint to present a "substantial federal question" such that complete preemption may be found to exist, the plaintiff must have a private right of action under federal law. *See Seinfeld v. Austen*, 39 F.2d 761,764 (7th Cir. 1994) ("Under *Merrell Dow* . . . 'if federal law does not provide a private right of action, then a state law action based on its violation perforce does not raise a "substantial" federal question.'" (quoting *Utley v. Varian Assocs., Inc.*, 811 F.2d 1279, 1283 (9th Cir.), *cert. denied*, 484 U.S. 824 (1987)); *see also Rogers v. Tyson Foods, Inc.*, 308 F.3d 785, 788 (7th Cir. 2002) ("Most circuits share our view that the existence of a private right of action under federal law is an antecedent of complete preemption.").

31. There are ample federal remedies available to plaintiffs with respect to the alleged conduct and harm of which they complain in this action. Indeed, only yesterday a leading plaintiffs' securities class action firm, Milberg Weiss, filed a putative class action in the United States District Court for the Southern District of New York on behalf of shareholders of various Putnam mutual funds, including the Putnam International Growth and Income Fund, alleging violations by defendants of various provisions of the 1933 and 1934 Acts, as well as violation of § 206 of the Investment Advisors Act, in connection with the very same NAV pricing practices at issue in this action. A copy of that complaint, captioned *Sheila Schulman as Trustee for Marital Trust of the Beneficial SEP*

IRA Plan for Allen Schulman IRA Plan v. Putnam American Government Income Fund, et al., may be viewed at Milberg Weiss' Website at www.milberg.com.

32. To conclude, because plaintiffs' claims are predicated on alleged violations of federal law, because there are substantial disputed questions as to the interpretation of that law, and because plaintiffs have remedies available to them under federal law, the Court should find that removal is proper on the ground that this action presents a "substantial federal question," as well as on the ground that plaintiffs' state-law class action claims are preempted by SLUSA.

Dated: October 23, 2003

[attorney name and address blocks omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

Civil No. 03-CV-0693-DRH

ROBERT POTTER AND DOROTHY LUETTINGER, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Plaintiffs,

v.

JANUS INVESTMENT FUND, A BUSINESS TRUST; JANUS CAPITAL MANAGEMENT, LLC; SCUDDER INTERNATIONAL FUND, INC., A CORPORATION; AND DEUTSCHE INVESTMENT MANAGEMENT AMERICAS, INC.,
Defendants.

[Filed Oct. 23, 2003]

NOTICE OF REMOVAL

PLEASE TAKE NOTICE that Defendants SCUDDER INTERNATIONAL FUND, INC. and DEUTSCHE INVESTMENT MANAGEMENT AMERICAS, INC., by their undersigned attorneys, hereby remove the above-entitled action, originally filed in the Circuit Court of the Third Judicial Circuit, Madison County, Illinois, to the United States District Court for the Southern District of Illinois, pursuant to 23 [*sic*] U.S.C. §§ 1441 and 1446 and the Securities Litigation Uniform Standards Act of 1998, 15 U.S.C. § 78bb ("SLUSA"). A copy of SLUSA, as codified at 15 U.S.C. § 78bb is attached hereto as Exhibit A. Defendants JANUS INVESTMENT FUND and JANUS CAPITAL MANAGEMENT, LLC expressly consent to this removal and will file with the Court a separate Notice joining in this removal.

I. PROCEEDINGS TO DATE

1. On September 16, 2003, Plaintiffs commenced an action against defendants entitled, ***Robert Potter and Dorothy Luettinger v. Janus Investment Fund, Janus Capital Management, LLC, Scudder International Fund, Inc. and Deutsche Investment Management Americas, Inc.***, Case No. 2003 L 001254, in the Circuit Court of the Third Judicial Circuit, Madison County, Illinois. True and correct copies of all pleadings, papers and other matters filed in this action are attached as Exhibit B.

2. Plaintiffs purport to represent a class of investors who held shares in the Janus Investment Fund (the "Janus Fund") or the Scudder International Fund, Inc. (the "Scudder Fund") for a period of more than fourteen days before redeeming or exchanging them, between September 16, 1998 and September 16, 2003. Plaintiffs have asserted state common law causes of action against defendants, including negligent and willful breach of a duty of care allegedly owed to Plaintiffs.

3. The Janus Fund is a Delaware business trust registered as an investment company under the Investment Company Act of 1940, 15 U.S.C. § 80a-1, *et seq.* (the "1940 Act"). Janus Capital Management, LLC, a subsidiary of Janus Capital Group Inc., is the investment advisor for the Janus Fund.

4. The Scudder Fund is a Maryland corporation registered as an investment company under the 1940 Act. Deutsche Investment Management Americas, Inc. is the investment advisor for the Scudder Fund.

II. TIMELINESS

5. Plaintiffs served Deutsche Investment Management Americas, Inc. and the Scudder Fund on or after September 24, 2003. Plaintiffs served the Janus Fund and Janus Capital Management LLC on or after September 27, 2003. This Notice of Removal is filed within 30 days of September 24, 2003, in compliance with 28 U.S.C. § 1446(b). The thirty day removal period set forth in 28

U.S.C. § 1446(b) is measured from the date of service. *Murphy Brothers, Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 354, 119 S. Ct. 1322, 1328 (1999). Nonetheless, defendants did not receive the complaint until September 24, 2003, at the earliest.

III. GROUNDS FOR REMOVAL

A. Federal Question Jurisdiction

6. The Court has subject matter jurisdiction over this action pursuant to SLUSA. Specifically, Section 16 of SLUSA amended Section 28 of the Securities Exchange Act of 1934 (15 U.S.C. § 78bb) by adding, *inter alia*, subsection (f)(2), entitled, "Removal of Covered Class Actions." This new subsection provides, "[a]ny covered class action brought in any State Court involving a covered security, as set forth in paragraph (1), shall be removable to the Federal district court for the district in which the action is pending, and shall be subject to paragraph (1)." 15 U.S.C. § 78bb(f)(2).

7. Paragraph 1, referred to in the foregoing removal provision, preempts certain State statutory and common law claims and also makes subject to removal a "covered class action based on the statutory or common law of any State or subdivision thereof . . . alleging –

(A) a misrepresentation or omission of material fact in connection with the purchase or sale of a covered security; or

(B) that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security."

15 U.S.C. §§ 78bb(f)(1).

8. A "covered class action" is one in which "damages are sought on behalf of more than 50 persons or prospective class members," or where "one or more named parties seek to recover damages on a representative basis on behalf of themselves and other unnamed parties similarly situated," and common questions of law and fact predomi-

nate over questions affecting individual persons or class members. 15 U.S.C. § 78bb(f)(5)(B)(I) & (II). Plaintiffs bring this action seeking damages (along with other relief) for themselves individually and on behalf of a putative class of "all others similarly situated." They allege that there are questions of law and fact common to the class, which questions predominate over any questions affecting only individual class members. (Complaint ¶ 44).[1] Therefore, this action is a covered class action.

9. Shares of the Scudder Fund and the Janus Fund are securities issued by investment companies that are registered under the 1940 Act. Thus, those securities are "covered securit[ies]," a term SLUSA borrows from Sections 18(b)(1) and (2) of the Securities Act of 1933. *See* 15 U.S.C. § 78bb(f)(5)(E); 15 U.S.C. § 77r(b)(2).

10. Plaintiffs' claims are "in connection with" the purchase or sale of a covered security because they are based upon statements and alleged manipulative conduct relating to the value and nature of securities sold or consideration received. *See Saxe v. E.F. Hutton & Co.*, 789 F.2d 105, 108 (2d Cir. 1986); *see also SEC v. Zandford*, 535 U.S. 813, 819 122 S. Ct. 1899, 1903-04 (2002) ("It is enough that the scheme to defraud and the sale of securities coincide").

11. Although Plaintiffs' claims are alleged as negligence and breach of duty claims, the essence of the claims alleged by Plaintiffs relate to Defendants' alleged misrepresentation or omissions concerning market timing and valuation or to alleged manipulative or deceptive devices or contrivances concerning market timing and valuation. "Artful pleading" in which plaintiffs "disguis[e] a federal claim as a claim arising under state law," cannot defeat removal pursuant to SLUSA – courts are required to "look behind the complaint" to ascertain the true nature of

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[1] Defendants do not concede that this action may be properly certified as a class action; they merely restate the allegations set forth in Plaintiffs' Complaint.

Plaintiffs' claims. *See Korsinsky v. Salomon Smith Barney Inc.*, No. 01 Civ. 6085 (SWK), 2002 WL 27775, at *2 (S.D.N.Y. Jan. 10, 2002) (denying motion to remand and granting motion to dismiss complaint pursuant to SLUSA). As a result, the SLUSA mandates that this action be removed to federal court. *See* 15 U.S.C. § 78bb(f)(1)(A) and (B).

12. The federal nature of Plaintiffs' claims is further highlighted by Section 27 of the Securities Exchange Act of 1934, 15 U.S.C. § 78aa, which provides exclusive federal jurisdiction for claims, like those here, that allege violation of duties arising in connection with the purchase or sale of the securities at issue. Section 27 underscores the fact that Plaintiffs' allegations, in substance, seek relief for a violation of federal law and are therefore removable to federal court. *See, e.g., Federated Dept. Stores, Inc. v. Moitie*, 452 U.S. 394, 398 n.2 (1981) (removal is proper where "the real nature of the claim is federal, regardless of plaintiff's characterization.").

13. Plaintiffs' claims also give rise to a federal question and are thus removable because, in substance, they arise under the 1940 Act and the rules and regulations promulgated thereunder. 28 U.S.C. § 1331. Again, plaintiffs cannot avoid federal jurisdiction through artful pleading in which their federal claims are disguised as state law claims. *See Leu v. Norfolk & Western Ry. Co.*, 820 F.2d 825, 830-31 (7th Cir. 1987) (plaintiffs "cannot escape the exclusive governance of the [Railway Labor Act] by articulating their claims in terms of a state tort action"). Plaintiffs' claims are based upon the alleged improper calculation and valuation of the net asset value of the Janus Fund and the Scudder Fund. The requirement of "forward-pricing," that all sales and purchases of fund shares occur at the next current net asset value, is a requirement of Rule 22c-1 of the General Rules and Regulations under the 1940 Act (the "1940 Act Regulations"). The method for calculating current net asset value for purposes of such sales and purchases is also set forth and governed by the 1940 Act and the 1940 Act Regulations.

See, e.g., 15 U.S.C. § 80a-22(c); 17 C.F.R. §§ 270.2a-4, 270.22c-1, and 270.22c-2. In fact, Plaintiffs' Count II and Count IV, asserting that defendants disregarded "applicable published regulations expressly recogniz[ing] that changes in trading prices of securities in [the funds] might occur daily after the closing of the New York Stock Exchange," (Compl. ¶¶ 59, 72), allege in substance that defendants violated Rule 2a-4 promulgated under the 1940 Act, although the Complaint itself does not specifically identify the regulation at issue. Such claims, as well as Plaintiffs' other claims relating to the calculation of the net asset value of the funds, are in substance 1940 Act claims, despite Plaintiffs' failure to specifically so allege.

14. Section 44 of the 1940 Act provides for the concurrent jurisdiction of state and federal courts over claims brought pursuant to the 1940 Act. 15 U.S.C. § 80a-44. Where a statute authorizes suits in both state and federal court, the action may be removed to federal court. *Ullmo v. Gilmour Acad.*, 273 F.3d 671, 680 (6th Cir. 2001). Removal based upon the federal jurisdiction provided by the 1940 Act is thus proper. 28 U.S.C. § 1331.

B. Diversity Jurisdiction

15. In the alternative, the Court has subject matter jurisdiction over this action with respect to the claims brought by Dorothy Leuttinger against Scudder International Fund, Inc. and Deutsche Investment Management Americas, Inc. based upon the diversity of citizenship of the parties. 28 U.S.C. § 1332.[2] Section 1332 provides that district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds $75,000 and is between citizens of different states. 28 U.S.C. § 1332(a)(1).

16. The claims asserted by Ms. Leuttinger against Scudder International Fund, Inc. and Deutsche Investment Management Americas, Inc. are wholly unrelated to

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[2] Mr. Potter does not assert claims against Scudder International Fund, Inc. or Deutsche Investment Management Americas, Inc.

the claims brought by Robert Potter against the Janus Investment Fund and Janus Capital Management, LLC. Scudder International Fund and Deutsche Investment Management Americas, Inc. thus intend to promptly move to sever Ms. Leuttinger's claims against them from Mr. Potter's claims against the Janus Investment Fund and Janus Capital Management, LLC. *See Nelson v. AIM Advisors, Inc.*, No. 01-CV-0282-MJR, 2002 WL 442189, at *2 (S.D. Ill. Mar. 8, 2002) (severing class action claims against unrelated mutual funds and mutual fund investment advisors where claims for relief did not arise out of the same transaction and defendants did not have relationship with each other); *Jaffke v. Anderson*, 162 Ill. App. 3d 290, 295, 515 N.E.2d 345, 348 (1987) (causes of action against multiple defendants arising from separate and distinct series transactions or series of transactions were improperly joined and should have been severed). Accordingly, there exists an additional basis for federal jurisdiction over Ms. Leuttinger's claims against Scudder International Fund and Deutsche Investment Management Americas, Inc., based upon the diversity of citizenship between them. 28 U.S.C. § 1332.[3]

17. If the claims asserted in the Complaint are not considered to be federal claims relating to misrepresentations, omissions or manipulative conduct concerning market timing and valuation, then they necessarily must be considered as claims that the funds themselves were damaged by mismanagement and the resulting dilution caused by market timers and the conduct alleged in the Complaint, to the detriment of all shareholders and the funds.

18. Allegations that the Scudder Fund was damaged by the alleged conduct constitute claims belonging to the fund itself, not to individual shareholders, and can thus only be

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[3] Diversity of citizenship does not exist with respect to the claims brought by Mr. Potter against the Janus Investment Fund and Janus Capital Management, LLC because the Janus Investment Fund is a Delaware business trust and one of its trustees is a citizen of Illinois.

asserted derivatively, rather than in Plaintiffs' individual capacities. *See, e.g., Meyers v. Brinson Advisors, Inc.*, No. 02-CV-0222-DRH, slip op. at 5 (S.D. Ill. July 22, 2002) (denying motion to remand direct action for breach of fiduciary duty brought by mutual fund shareholders against mutual fund where action was properly considered to be derivative action and removal was proper); *Danielewicz v. Arnold*, 137 Md. App. 601, 616, 769 A.2d 274, 283 (2001) (action to recover for injury to corporation can only be brought derivatively even though injury may incidentally affect shareholder by diminishing or destroying value of stock).[4] The "characterization of [ ]claims as individual, rather than derivative, does not make them so," and the Court must consider "the nature of the wrong plaintiff alleges in the body of the complaint." *Cottle v. Standard Brands Paint Co.*, CIV. A. Nos. 9342, CIV. A. 9405, CIV. A. 9151, 1990 WL 34824, at *2 (Del. Ch. March 22, 1990).

19. Because Plaintiffs' claims are, in reality, derivative claims on behalf of the fund, the Scudder Fund is to be treated as a nominal defendant, not a plaintiff, for purposes of diversity jurisdiction analysis. *See Abrams v. Koether*, Case No. 90 C 3204, 1990 WL 84536, at *1 (N.D. Ill. June 11, 1990). Accordingly, complete diversity exists since Plaintiffs are citizens of Illinois while the Scudder Fund was incorporated in Maryland with its principal place of business in New York and Deutsche Investment Management Americas, Inc. was incorporated in Delaware with its principal place of business in New York.

20. The damages to be considered for purposes of the amount in controversy requirement are the alleged damages suffered by the fund as a whole, not simply the damages of the nominal plaintiffs. Although the putative plaintiff class representatives disclaim damages in excess

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[4] Maryland law applies because the Scudder Fund, on whose behalf the claims may be asserted, is a Maryland corporation. *Meyers v. Brinson Advisors, Inc.*, No. 02-CV-0222-DRH, slip op. at 4 (S.D. Ill. July 22, 2002).

of $75,000 per individual fund shareholder, they seek aggregate damages, which as set forth above may only be sought derivatively on behalf of the funds, far in excess of the jurisdictional amount. 28 U.S.C. § 1332(a). Moreover, the amount in controversy for purposes of a diversity jurisdiction analysis is based not upon the amount sought by a particular plaintiff but "the amount at stake to either party to the suit." *BEM I, LLC v. Anthropologie, Inc.*, 301 F.3d 548, 553 (7th Cir. 2002). The amount at stake to the fund exceeds the jurisdictional amount and thus satisfies the requirements of diversity jurisdiction. 28 U.S.C. § 1332(a).

V. VENUE

21. Venue is proper in this district and division under 28 U.S.C. § 1441(a) and 15 U.S.C. § 78bb(f)(2), "Removal of Covered Class Actions," added by SLUSA, because the removed action has been pending in this district. Defendants reserve the right to seek the transfer of this matter to another district.

VI. NOTICE

22. Defendants will promptly file a copy of this Notice of Removal with the Clerk of the Circuit Court of the Third Judicial Circuit, Madison County, Illinois, in which the action has been pending and will serve such notice upon all adverse parties.

Dated: October 23, 2003

[attorney name and address blocks omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

Civil No. 03-CV-0693-DRH

ROBERT POTTER AND DOROTHY LUETTINGER, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Plaintiffs.

v.

JANUS INVESTMENT FUND, A BUSINESS TRUST; JANUS CAPITAL MANAGEMENT, LLC; SCUDDER INTERNATIONAL FUND, INC., A CORPORATION; AND DEUTSCHE INVESTMENT MANAGEMENT AMERICAS, INC.,
Defendants.

[Filed Oct. 23, 2003]

JANUS CAPITAL'S NOTICE OF CONSENT TO AND JOINDER IN REMOVAL AND NOTICE OF FILING AFFIDAVIT OF CONSENT TO REMOVAL

Janus Capital Management, LLC ("Janus Capital"), by and through undersigned counsel, hereby files its Notice of Consent to and Joinder in Removal (hereinafter "Joinder Notice") and the accompanying Affidavit of Consent to Removal (hereinafter "Affidavit of Consent") executed by the counsel of record for Janus Investment Fund. In support thereof, Janus Capital states as follows:

1. Janus Capital hereby consents to the Notice of Removal filed in the above captioned action on this day, the 23rd of October, 2003, by defendants Scudder International Fund, Inc. ("Scudder") and Deutsche Investment Management Americas, Inc. ("Deutsche Investment") (hereinafter "Notice of Removal"). A true and correct copy

of the Notice of Removal with its exhibits are attached herewith as Exhibit A.

2. Janus Capital furthermore expressly consents to and joins in Paragraphs 1-14 and 21-22 of the Notice of Removal, which paragraphs are incorporated herein by reference.

3. Janus Capital furthermore files herewith a sworn Affidavit of Consent to Removal, executed on this day, the 23rd of October, 2003, by Dale R. Harris, counsel of record for Janus Investment Fund in the above-captioned action. The Affidavit of Consent is attached as Exhibit B.

Dated: October 23, 2003

[attorney name and address blocks omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

Civil No. 03-CV-843-DRH

GARY VOGELER, INDIVIDUALLY AND
ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Plaintiff,

v.

COLUMBIA ACORN TRUST AND
COLUMBIA WANGER ASSET MANAGEMENT, LP,
Defendants.

[Filed Dec. 12, 2003]

NOTICE OF REMOVAL

Pursuant to 28 U.S.C. §§ 1441 and 1446(a), defendants Columbia Acorn Trust and Columbia Wanger Asset Management, LP (collectively the "Columbia Defendants"), hereby give notice of their removal of Vogeler v. Columbia Acorn Trust and Columbia Wanger Asset Management, LP, No. 03 L 1550, from the Circuit Court of the Third Judicial Circuit, Madison County, Illinois, to the United States District Court for the Southern District of Illinois, and in support of such removal state as follows:

BACKGROUND

1. The Complaint in this action was filed on November 13, 2003 in the Circuit Court of the Third Judicial Circuit, Madison County, Illinois. A Summons was issued for each defendant on November 14, 2003.

2. The Columbia Defendants were served with the Summons and Complaint in Chicago, Illinois on November 21, 2003. Copies of the Summons and Complaint are attached as Group Exhibit A.

3. The foregoing Summons and Complaint constitute all process, pleadings and orders served upon or received by the Columbia Defendants while this action was pending in the Circuit Court of the Third Judicial Circuit, Madison County, Illinois.

BASES FOR REMOVAL

4. This action is removable to this Court pursuant to both 28 U.S.C. § 1441(a) and 28 U.S.C. § 1441(b) on each of the following grounds:

(a) This Court has original jurisdiction over this action in its entirety under 28 U.S.C. § 1331 in that plaintiff's action is founded on and rooted in preeminent federal law, specifically, the Investment Company Act of 1940, 15 U.S.C. § 80a-1, et seq., (the "1940 Act"), and the Regulations promulgated by the Securities and Exchange Commission (the "SEC") under the 1940 Act, which define the duties of investment advisors of registered investment companies and which exclusively govern the calculation of the Net Asset Value ("NAV") of mutual fund shares. Specifically, the requirement that all purchases and redemptions of mutual fund shares occur at the next current NAV is imposed by Rule 22c-1 of the Code of Federal Regulations under the 1940 Act. *See, e.g.*, 15 U.S.C., § 80a-22(c); 17 C.F.R. §§ 270.2a-4, 270.22c-1 and 270.22c-2. Moreover, the Complaint in this case itself acknowledges and incorporates federal law governing the calculation of NAV in that it relies upon "applicable published regulations" effective "[o]n or about January 11, 1965" – an implicit reference to SEC Rule 2a-4 under the 1940 Act, which was promulgated on December 30, 1964. (See Compl., ¶ 52). Pursuant to Section 44 of the 1940 Act, 15 U.S.C. § 80a-43, the Court possesses jurisdiction over "all suits in equity and actions at law brought to enforce any liability or duty" created by the 1940 Act or by "the rules, regulations, or orders" issued by the SEC thereunder.

(b) Further, if and to the extent any portion of the claims asserted by plaintiff are individual (and not derivative) in nature, they would be claims in connection with the purchase or sale of securities, and therefore are removable to this Court under the Securities Litigation Uniform Standards Act of 1998, 15 U.S.C. §§ 77p, 78bb(f) ("SLUSA"). *See also* Section 27 of the Securities Exchange Act of 1934, 15 U.S.C. § 78aa (vesting exclusive jurisdiction in federal courts over actions brought for violations of the Securities Exchange Act of 1934 or of rules and regulations thereunder). Plaintiff's claims are predicated upon the NAV of mutual fund shares "sold to investors such as Plaintiff." (Compl., ¶ 9) Such claims present (if anything) a federal question as to which this Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331.

(c) Because the Court has original jurisdiction in this action, it can and should exercise supplemental jurisdiction as to any direct claims that may exist under state law pursuant to 28 U.S.C. § 1367 and 28 U.S.C. § 1441(c).

VENUE

5. Venue is proper in this Court because the Southern District is the district embracing the place where the state court action is pending.

TIMELINESS OF REMOVAL

6. The Columbia Defendants file this notice within thirty days of receipt of a copy of the Complaint, plaintiff's initial pleading.

7. As required by 28 U.S.C. § 1446(d), a copy of this Notice of Removal is being served on the Clerk of the Circuit Court of the Third Judicial Circuit, Madison County, Illinois, and on plaintiff's counsel.

8. Both defendants hereby consent to the removal of this action to this Court.

9. The Columbia Defendants reserve the right to amend or supplement this Notice of Removal.

CONCLUSION

Removal to this Court is, therefore, proper because this Court has original jurisdiction over this action.

Dated: December 12, 2003.

[attorney name and address blocks omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

Civil No. 03-CV-852-GPM

STEVE AND BETH DUDLEY,
INDIVIDUALLY AND ON BEHALF OF ALL OTHERS
SIMILARLY SITUATED,
Plaintiffs,

v.

PUTNAM INTERNATIONAL EQUITY FUND AND
PUTNAM INVESTMENT MANAGEMENT, LLC,
Defendants.

[Filed Dec. 15, 2003]

NOTICE OF REMOVAL

To: All Counsel on the Attached Service List

PLEASE TAKE NOTICE that, pursuant to 28 U.S.C. §§ 1441 and 1446 and the applicable provisions of the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"), defendants Putnam International Equity Fund and Putnam Investment Management, LLC (collectively, "Putnam") hereby remove the matter entitled *Steve and Beth Dudley, individually and on behalf of all others similarly situated, Plaintiffs, v. Putnam International Equity Fund and Putnam Investment Management, LLC, Defendants*, cause number 03-L-1539 (hereinafter referred to as "State Court Action") from the Circuit Court of Madison County, Illinois, to the United States District Court for the Southern District of Illinois. This action is removable under SLUSA because it is a "covered class action" alleging fraud in connection with the purchase or sale of "covered securities," as those terms are defined by SLUSA. The action also is removable on the ground that

it presents a "substantial federal question" in that any duties defendants had with respect to the pricing of shares of the Putnam International Equity Fund arose exclusively under the federal securities laws, and plaintiffs have available remedies under the federal securities laws.

Background of the Action and Plaintiffs' Allegations

1. On November 10, 2003, plaintiffs commenced the State Court Action in the Circuit Court of Madison County, Illinois.

2. Defendants Putnam International Equity Fund and Putnam Investment Management, LLC were served with copies of the Summons and Complaint in the State Court Action on November 19, 2003. A copy of all process, pleadings and orders from the State Court Action are attached hereto as Exhibit A. All defendants consent to removal and this Notice of Removal has been filed within thirty days of service of the Summons and Complaint on the first-served defendant.

3. The Complaint concerns the manner in which Putnam allegedly determined the prices at which shares of the Putnam International Equity Fund (the "Fund") would be sold to the investing public. Specifically, plaintiffs allege that:

(a) the Fund is an open-end mutual fund whose shares are sold to investors at prices based upon the net asset value ("NAV") per share plus applicable sales charges (Compl. ¶ 9);

(b) investors may redeem their shares at the NAV of the shares less any redemption charges (Compl. ¶ 9);

(c) defendants recalculate the NAV of the Fund's shares once each business day at the close of trading on the New York Stock Exchange (the "NYSE") at 4:00 p.m. Eastern Time and report the NAV to the National Association of Securities Dealers (the "NASD") for dissemination to the public (Compl. ¶ 11);

(d) securities issued by non-U.S. companies are a significant portion of the Fund's portfolio (Compl. ¶ 12);

(e) the foreign exchanges on which the Fund's non-U.S. securities are traded close from five to fifteen hours ahead of Eastern Standard Time (Compl. ¶ 12);

(f) there is a positive correlation between price movements in the U.S. market and those in the foreign markets such that it is possible to predict the next-day movement of prices in the foreign markets based on the performance of the U.S. market (Compl. ¶ 13);

(g) despite the fact that the prices of the foreign securities held by the Fund are "stale" as of 4:00 p.m. Eastern Time, when the Fund calculates its NAV, and despite the correlation between price movements in the U.S. market and future price movements in the foreign markets, the Fund uses the last trade price in the home market for each of its foreign securities when calculating the daily NAV. (Compl. ¶ 12,13, 16.)[1]

4. Plaintiffs contend that defendants' alleged pricing practices for non-U.S. securities "have exposed long term shareholders to market timing traders who regularly purchase and redeem Defendants' shares as part of a profitable trading strategy." (Compl. ¶ 29.) According to plaintiffs,

(a) "market timers who buy Defendants' fund shares on days when the United States market moves up are buying discounted shares at the expense of other fund shareholders because the funds [sic] underlying foreign securities are undervalued as of the time of the share purchase" (Compl. ¶ 30); and

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[1] Defendants do not concede the truth of plaintiffs' allegations regarding their policies or practices in pricing foreign securities for purposes of determining the Fund's daily NAV.

(b) "market timers who sell (redeem) Defendants' fund shares on days when the United States market moves down are selling (redeeming) shares at a premium at the expense of other fund shareholders because the underlying foreign securities are overvalued as of the time of the sale (redemption). (Compl. ¶ 31.)

5. Plaintiffs claim the activities of the market timers result in dilution of the value of their shares and a transfer of wealth from the long-term buy-and-hold shareholders to the market timers. (Compl. ¶¶ 33, 34.)

6. Based on these allegations, plaintiffs assert two separate counts against defendants:

(a) In Count I of the Complaint, plaintiffs contend that defendants breached their duty of care to plaintiffs by:

(i) "failing to properly evaluate on a daily basis whether a significant event affecting the value of Putnam International Equity Fund's portfolio of securities had occurred after the foreign trading markets for such securities had closed but before Defendants calculated NAV and share prices" (Compl. ¶ 49(a));

(ii) "failing to implement Putnam International Equity Fund's portfolio valuation and share pricing policies and procedures" (Compl. ¶ 49(b)); and

(iii) "allowing portfolio valuation and share pricing policies and procedures which benefited market timing traders of Putnam International Equity Fund's shares at the expense of long term shareholders." (Compl. ¶ 49(c).)

(b) In Count II of the Complaint, plaintiffs contend that defendants acted "with utter indifference and conscious disregard" for plaintiffs' investments and "willfully and wantonly" breached their duties to plaintiffs (Compl. ¶ 54) by:

(i) "failing to know and implement applicable rules and regulations concerning the calculation of NAV" (Compl. ¶ 54(a));

(ii) "failing to properly evaluate on a daily basis whether a significant event affecting the value of Putnam International Equity Fund's portfolio of securities had occurred after the foreign trading markets for such securities had closed but before Defendants calculated NAV and share prices" (Compl. ¶ 54(b));

(iii) "failing to implement Putnam International Equity Fund's portfolio valuation and share pricing policies and procedures" (Compl. ¶ 54(c)); and

(iv) "allowing portfolio valuation and share pricing policies and procedures which benefited market timing traders of Putnam International Equity Fund's shares at the expense of long term shareholders." (Compl. ¶ 54(d).)

7. Plaintiffs purport to bring this action on behalf of themselves and a putative class consisting of "all persons in the United States who have held shares of Putnam International Equity Fund for more than fourteen days from the date of purchase to the date of sale (redemption) or exchange ('long term shareholders')." (Compl. ¶ 37.) Plaintiffs assert that the class period begins five years before the date of filing of the Complaint and continues through the date on which the Complaint was filed. (*Id.*)

Grounds for Removal Under SLUSA

8. In 1998 Congress enacted SLUSA, Pub. L. No 105-353, to prevent securities class action plaintiffs from evading the heightened pleading standards of the Private Securities Litigation Reform Act of 1995 (the "PSLRA"), and the PSLRA's mandatory stay of discovery pending resolution of a motion to dismiss, by filing securities class actions in state courts. *Lander v. Hartford Life & Annuity Ins. Co.*, 251 F.3d 101, 107-08 (2d Cir. 2001). SLUSA amended the Securities Act of 1933 (the "1933 Act") and the Securities Exchange Act of 1934 (the "1934 Act").

Those amendments are codified at 15 U.S.C. § 77p(b) and (c) and 15 U.S.C. § 78bb(f)(1) and (2), respectively.[2]

9. SLUSA's amendments to the 1934 Act provide, in pertinent part:

> (1) Class action limitations
>
> No covered class action based upon the statutory or common law of any State or subdivision thereof may be maintained in any State or Federal Court by any private party alleging –
>
> (A) a misrepresentation or omission of material fact in connection with the purchase or sale of a covered security; or
>
> (B) that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security.
>
> (2) Removal of covered class actions
>
> Any covered class action brought in any State court involving a covered security, as set forth in paragraph (1), shall be removable to the Federal district court for the district in which the action is pending, and shall be subject to paragraph (1).

15 U.S.C. § 78bb(f).

10. SLUSA thus makes federal courts the exclusive venue for "covered class actions" alleging fraud in connection with the purchase or sale of "covered securities" and mandates that such class actions be governed exclusively by federal law. *Lander*, 251 F.2d at 108; *see also* H.R. CONF. REP. NO. 105-803, at 13 (1998) (stating that SLUSA "establishes uniform rules for securities class action litigation involving our national capital markets" and that "class actions relating to a 'covered security' . . . alleging fraud or manipulation must be maintained pursuant to

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[2] Citations herein are to the applicable provisions of the 1934 Act, as amended by the SLUSA.

the provisions of Federal securities law, in Federal court").

11. Despite plaintiffs' attempt to avoid removal under SLUSA by couching their Complaint as a state-law breach of fiduciary duty suit on behalf of "holders" of shares of the Fund, a careful examination of plaintiffs' allegations shows that this case falls squarely within the contours of SLUSA.

12. **Covered Class Action.** An action is a "covered class action" for purposes of SLUSA if it involves common questions of law or fact that predominate over any individual questions and is brought (i) on behalf of more than 50 persons or prospective class members" or (ii) on a representative basis by one or more parties suing on behalf of themselves and other unnamed parties similarly situated. 15 U.S.C. § 78bb(f)(5)(B). This action is a "covered class action" within the meaning of SLUSA because the two named plaintiffs purport to bring this action on behalf of themselves and all others similarly situated (Compl. p.1) and allege that "[c]ommon questions of law or fact predominate over any questions affecting only individual members of the Class." (Compl. ¶ 40.)

13. **Covered Securities.** A "covered security" for purposes of SLUSA is one that meets the definition of a "covered security" provided in § 18(b) of the 1933 Act, 15 U.S.C. § 77r(b), at the time the misrepresentation, omission, manipulative act or deceptive conduct is alleged to have occurred. 15 U.S.C. § 78bb(f)(5)(E). The 1933 Act's definition of "covered securities" includes "a security issued by an investment company that is registered, or that has filed a registration statement, under the Investment Company Act of 1940." 15 U.S.C. § 77r(b)(2). The shares of the Putnam International Equity Fund are "covered securities" within the meaning of SLUSA because the shares are issued by an investment company registered under the Investment Company Act of 1940. As set forth in note 1 to the financial statements in the Putnam International Equity Fund's Annual Report for its fiscal year

ended June 30, 2003 (available at Putnam's Website at www.putnam.com): "Putnam International Equity Fund (formerly known as Putnam International Growth Fund) ("the fund") is registered under the Investment Company Act of 1940, as amended, as a diversified, open-end management investment company."

14. **Alleged Misrepresentations and Omissions of Material Fact.** Plaintiffs allege that defendants "promoted, marketed, and sold shares of the Fund to the investing public nationwide." (Compl. ¶¶ 2.) Plaintiffs claim that defendants marketed the Funds as having "*the stated goal* of providing long term capital growth to investors who hold shares of the [Funds]." (Compl. ¶ 45 (emphasis added).) Plaintiffs, in essence, contend that this "stated goal" was false because, according to plaintiffs, defendants' practices in calculating the daily NAV of the Fund's shares "have exposed long term shareholders to market timing traders" (Compl. ¶ 29) and have resulted in a "transfer of wealth from the non-trading long term buy and hold shareholders to the market timing traders . . . through dilution." (Compl. ¶ 33.)

15. Plaintiffs further allege that defendants publicly reported the allegedly "artificially inflated" or "artificially deflated" daily NAV to the Fund's shareholders and the investing public by reporting the calculated NAV to the NASD for dissemination to the public (Compl. ¶ 11), and through defendants' interactive Website, which defendants allegedly use to communicate with shareholders regarding the performance of the Fund and the Fund's investments (Compl. ¶ 3.)

16. By contending that defendants' misrepresented that the Fund was appropriate for long-term buy-and-hold investors and misrepresented the daily NAV of the Fund's shares plaintiffs have alleged that defendants misrepresented and omitted material facts concerning their investments in, and the value of, the Fund's shares.

17. **Alleged Manipulative Device or Contrivance.** Even if plaintiffs had not alleged any misrepresentations

or omissions of material fact, SLUSA does not apply *only* where there are alleged misrepresentations or omissions of material facts. Rather, SLUSA *also* applies to class actions alleging that "the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security." 15 U.S.C. 78bb(f)(1)(B).[3]

18. The essence of plaintiffs' Complaint is that defendants engaged in *manipulation* of the Fund's share prices in that they allegedly caused the share prices to be artificially inflated or deflated at various times by not adjusting the NAV, which they allegedly determined by using the last trade prices on the foreign markets, for "significant events" occurring subsequent to the close of those markets and prior to 4:00 p.m. Eastern Time. (Compl. ¶¶ 49(a), 54(b).) The United States Supreme Court's decision in *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462 (1977), leaves no doubt that defendants' alleged actions constitute "manipulation" within the meaning of Section 10(b) of the 1934 Act. In *Santa Fe* the Supreme Court explained:

> Manipulation is "virtually a term of art when used in connection with securities markets." . . . The term refers generally to practices, such as wash

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[3] The language of SLUSA tracks the language of Section 10(b) of the 1934 Act, 15 U.S.C. § 78j(b), which makes it unlawful for any person, in connection with the purchase or sale of a security, to use or employ "any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors." Securities and Exchange Commission ("SEC") Rule 10b-5, 17 C.F.R. § 240.10b-5, promulgated under Section 10(b) of the 1934 Act, makes it unlawful for any person, in connection with the purchase or sale of a security "(a) to employ any device, scheme or artifice to defraud, (b) to make any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or (c) to engage in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person."

> sales, matched orders, or rigged prices, that are intended to mislead investors by artificially affecting market activity.

Id. at 476 (emphasis added, citing *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 199 (1976) and 15 U.S.C. § 78i).

19. Thus, the fact that plaintiffs have styled their Complaint as one for alleged breach of fiduciary duties, rather than as a misrepresentation or omission action, does not take this case outside the ambit of the federal securities laws and the removal provisions of SLUSA governing securities class actions. *See, e.g., Denton v. H&R Block Fin. Advisors, Inc.*, 2001 U.S. Dist. LEXIS 15831, at *10 (N.D. Ill. Oct. 3, 2001) ("While it is true that allegations of breach of fiduciary duty alone will not sufficiently plead a securities fraud claim, a breach of fiduciary duty may give rise to a Rule 10b-5 claim where the alleged conduct 'can fairly be viewed as manipulative or deceptive within the meaning of the [Securities Act].") (Kocoras, Chief Judge.) (citing *Santa Fe*, holding that alleged claim for breach of fiduciary duty was preempted by SLUSA and properly removed to federal court, and dismissing the action).[4]

20. **In Connection With the Purchase of Sale of a Security.** SLUSA only preempts claims alleging misrepresentations or omissions of material facts or manipulative or deceptive devices or contrivances that occur "in connection with the purchase or sale" of covered securities. 15 U.S.C. § 88bb(f)(1)(A) and (B) (emphasis added).

21. In an effort to plead around SLUSA's "purchase or sale" requirement, plaintiffs define the proposed class to include "all persons in the United States who have held shares in Putnam International Equity Fund for more than fourteen days from the date of purchase to the date of sale (redemption) or exchange ('long term shareholders')." (Compl. ¶ 37 (emphasis added).) Plaintiffs' at-

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[4] District court cases are cited herein by way of example of analysis in similar cases.

tempt at artful pleading is unavailing. To avoid removal under SLUSA plaintiffs would have to define the class to include *only* those persons who held shares of the Fund at the beginning of the 5-year class period and continued to hold those shares as of the end of the 5-year class period. The class as defined, however, *also* includes (i) persons who held shares of the Fund at the beginning of the 5-year class period and continued to hold the shares for at least 14-days before selling them during the class period; (ii) persons who purchased shares during the 5-year class period and continued to hold them throughout the entire class period and (iii) persons who purchased shares during the class period and held them for at least 14-days before selling them during the class period.

22. SLUSA applies where the class as defined by plaintiffs *necessarily* includes purchasers and/or sellers of a covered security. *See, e.g., Riley v. Merrill Lynch, Pierce, Fenner & Smith*, 292 F.3d 1334, 1345 (11th Cir. 2002) ("[W]hen a claim that sweeps within its ambit actual purchases and sales of securities is covered by SLUSA, a plaintiff may not avoid SLUSA's restrictions simply by alleging that a given misrepresentation caused him both to purchase and hold a particular security."); *Professional Mgmt. Assocs., Inc. v. KPMG LLP*, 335 F.3d 800, 803 (8th Cir. 2003) (where a complaint implicitly alleges that misrepresentations and omissions were made in connection with the purchase of securities, the plaintiff "cannot avoid preemption by asserting it is only claiming damages suffered as a result of holding its stock"); *Hardy v. Merrill Lynch, Pierce, Fenner & Smith*, 189 F. Supp. 2d 14, 18 (S.D.N.Y. 2001) (finding claims preempted by SLUSA where the class definition necessarily included persons who purchased their shares after Merrill Lynch made allegedly misleading statements, even though class also included persons who already held shares at the time the alleged misstatements were made).

23. The misstatements and omissions of material fact and manipulative practices alleged by plaintiffs also meet SLUSA's requirement that they have been made or oc-

curred "in connection with" the purchases and sales of a covered security. SLUSA does not define the phrase "in connection with"; however, the identical phrase is used in Section 10(b) of the 1934 Act and courts construing SLUSA have looked to case law under the 1934 Act in interpreting this phrase. *See, e.g., Falkowski v. Imation Corp.*, 309 F.3d 1123, 1129 (9th Cir. 2002) (noting that because SLUSA employs language identical to the language of the 1933 and 1934 Acts, "it is logical to look to case law under the 1933 and 1934 Acts as a starting point for interpreting the phrase 'in connection with the purchase or sale'").

24. To satisfy the "in connection with" requirement for purposes of a Section 10(b) claim, a plaintiff need only show that he suffered injury as a result of deceptive practices "touching" his purchase or sale of securities. *Superintendent of Ins. of New York v. Bankers Life & Cas. Co.*, 404 U.S. 6, 12-13 (1971). The Supreme Court repeatedly has held that this requirement must be construed "'not technically and restrictively, but flexibly'" in order to promote Section 10(b)'s remedial purpose. *See Affiliated Ute Citizens of Utah v. Unites States*, 406 U.S. 128, 151 (1972) (quoting *SEC v. Capital Gains Research Bureau*, 375 U.S. 180, 186 (1963)).

25. As plaintiffs allege, shares of open end mutual funds such as the Putnam International Equity Fund are "sold to investors such as Plaintiffs at a price based upon the net asset value ("NAV") per share plus applicable sales charges" and redeemed (bought back by the Fund) "at the NAV of the shares less any redemption charges." (Compl. ¶ 9 (emphasis added).) Class members who bought shares of the Fund at times when the NAV purportedly was "artificially inflated" as a result of defendants' alleged pricing practices, and class members who sold shares at times when the NAV purportedly was "artificially deflated" as a result of defendants' alleged pricing practices, would have suffered monetary damages as a result as a result of alleged manipulative practices that "touched" their purchases and sales of shares of the Fund.

Plaintiffs' allegations, therefore, meet the "in connection with" requirement of Section 10(b) and SLUSA.

26. In sum, plaintiffs have alleged misrepresentations and omissions of material fact and/or fraudulent devices or contrivances by defendants in connection with the purchases and sales of class members who purchased and/or sold shares of the Fund during the alleged class period. Plaintiffs' claims fall squarely within the four corners of SLUSA and, therefore, are preempted – notwithstanding plaintiffs' attempt to artfully plead their securities class action claims as state-law claims. For these reasons, removal under SLUSA is proper and any motion by plaintiffs to remand should be denied.[5]

Grounds for Removal on the Basis That the Complaint Presents a Substantial Federal Question

27. The artful pleading exception to the well-pleaded complaint rule applies not only where Congress has expressly preempted a field, but also where a plaintiff's complaint presents a "substantial federal question." *Lippitt v. Raymond James Fin. Servs., Inc.*, 340 F.3d 1033, 1041 (9th Cir. 2003) (certain internal citations omitted).

28. Plaintiffs contend that defendants breached their duties to the class by "failing to know and implement applicable rules and regulations concerning the calculation of NAV." (Compl. ¶ 54(a).) However, defendants' duties with respect to the pricing of the Fund's shares arose *exclusively* under federal law. Specifically, SEC Rule 2a-4(a)(1), 17 C.F.R. 270.2a-4(a)(1), promulgated under § 2(a)(41) of the Investment Company Act of 1940, 15 U.S.C. § 80a-2(a)(41), provides that "[p]ortfolio securities with respect to which market quotations are readily available shall be valued at current market value, and other securities and assets shall be valued at fair value as determined in good faith by the board of directors of the

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[5] SLUSA would not prevent the two named plaintiffs from asserting their purported state law claims on an individual basis; rather, it only preempts their ability to assert these claims on a class basis.

registered company." Indeed, plaintiffs allude to Rule 2a-4(a)(1) in paragraph 52 of their Complaint, wherein they allege that applicable regulations governing the pricing of the shares of the Fund were published on or about January 1, 1965.[6]

29. Furthermore, how registered investment companies *should* price the shares of foreign companies under SEC Rule 2a-4 presents a substantial, *disputed* question of federal law. Plaintiffs contend that these shares should be priced at "fair value" rather than at their last trading price as of the close of the foreign exchange. (Compl. ¶ 13.) However, in a 2001 letter to the Investment Company Institute, the SEC noted that "funds generally calculate their NAVs by using the closing prices of portfolio securities on the exchange or market (whether foreign or domestic) on which the securities principally trade." 2001 SEC No-Act LEXIS 543, at *3-4 (Apr. 30, 2001). The SEC further noted that "the closing prices of foreign securities may not reflect their market values at a fund's NAV calculation if an event that will affect the value of those securities ("significant event") has occurred since the closing prices were established on the foreign exchange or market, but before the fund's NAV calculation." *Id.* The SEC, therefore, concluded that if a fund determines that a "significant event" has occurred since the closing of the foreign market but before calculation of the fund's NAV, the fund must value the foreign security pursuant to a fair value pricing methodology. *Id.* at *8. Notably, however, the SEC declined to define what constitutes a "significant event" requiring "fair value pricing" of foreign securities. *Id.* at * 10-11.

30. The issue of what constitutes a "significant event" requiring "fair value pricing" of foreign shares held in a mutual fund's portfolio implicates important federal interests. Indeed, Congress repeatedly has indicated its in-

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[6] SEC Rule 2a-4 was published in the Federal Register on December 30, 1964. *See* 29 FR 19101.

tent that nationally marketed securities should be governed by *uniform standards*. *See, e.g., Patneaude v. Equitable Life Assurance Soc'y*, 290 F.3d 1020, 1026 (9th Cir. 2002) (explaining that the PSLRA, the National Securities Markets Improvements Act of 1996, and SLUSA, "demonstrate that Congress intended to provide national, uniform standards for securities markets and nationally marketed securities"). Accordingly, the issue of how mutual funds should price the shares of foreign securities under SEC Rule 2a-4 should be decided by the federal courts, not the various state courts. *Cf. D'Alessio v. NYSE, Inc.*, 258 F.3d 93 (2d Cir. 2001) (holding that claims "arose under" federal law where claims were predicated on alleged breached of certain duties imposed on the NYSE by the 1934 Act and would require a court to interpret federal law governing securities trading on a national exchange); *see also, e.g., Sparta Surgical Corp. v. NASD, Inc.*, 159 F.3d 1209, 1212 (9th Cir. 1998) ("[A]lthough Sparta's theories are posited as state law claims, they are founded on the defendants' conduct in suspending trading and de-listing the offering, the propriety of which must be exclusively determined by federal law.")

31. The Seventh Circuit, interpreting the Supreme Court's decision in *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804 (1986), has held that for a complaint to present a "substantial federal question" such that complete preemption may be found to exist, the plaintiff must have a private right of action under federal law. *See Seinfeld v. Austen*, 39 F.2d 761, 764 (7th Cir. 1994) ("Under *Merrell Dow* . . . 'if federal law does not provide a private right of action, then a state law action based on its violation perforce does not raise a "substantial" federal question.'" (quoting *Utley v. Varian Assocs., Inc.*, 811 F.2d 1279, 1283 (9th Cir.), *cert. denied*, 484 U.S. 824 (1987)); *see also Rogers v. Tyson Foods, Inc.*, 308 F.3d 785, 788 (7th Cir. 2002) ("Most circuits share our view that the existence of a private right of action under federal law is an antecedent of complete preemption.").

32. There are ample federal remedies available to plaintiffs with respect to the alleged conduct and harm of which they complain in this action. Indeed, myriad federal securities class actions have been filed in various United States district courts on behalf of shareholders of Putnam mutual funds, including the Putnam International Equity Fund, alleging violations of various provisions of the federal securities laws in connection with the very same NAV pricing practices at issue in this action. On November 12, 2003, the Putnam defendants, including the two defendants named in this action, filed a motion with the Judicial Panel on Multidistrict Litigation seeking the transfer of the various actions to the United States District Court for the District of Massachusetts for coordinated or consolidated pretrial proceedings. As of that date, five actions were pending in the District of Massachusetts, six actions were pending in the Southern District of New York, and one action had been removed from this Court to the Southern District of Illinois. On November 24, 2003, the Putnam defendants filed a Notice of Related Actions with the Judicial Panel seeking the transfer of two additional actions filed in the District of Massachusetts and one additional action filed in the Southern District New York. On November 25, 2003, the Putnam defendants filed an additional Notice of Related Actions with the Judicial Panel seeking the transfer of six additional actions pending in the Southern District of New York, one additional action pending in the District of Massachusetts and one additional action pending in the Northern District of California. The Judicial Panel has not yet ruled on the Putnam defendants' motion.

33. To conclude, because plaintiffs' claims are predicated on alleged violations of federal law, because there are substantial disputed questions as to the interpretation of that law, and because plaintiffs have remedies available to them under federal law, the Court should find that removal is proper on the ground that this action presents a "substantial federal question," as well as on the

ground that plaintiffs' state-law class action claims are preempted by SLUSA.

Dated: December 15, 2003

[attorney name and address blocks omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

Civil No. 03-CV-853-GPM

STEVE AND BETH DUDLEY,
INDIVIDUALLY AND ON BEHALF OF ALL OTHERS
SIMILARLY SITUATED,
Plaintiffs,

v.

PUTNAM INVESTMENT FUNDS AND
PUTNAM INVESTMENT MANAGEMENT, LLC,
Defendants.

[Filed Dec. 15, 2003]

NOTICE OF REMOVAL

To: All Counsel on the Attached Service List

PLEASE TAKE NOTICE that, pursuant to 28 U.S.C. §§ 1441 and 1446 and the applicable provisions of the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"), defendants Putnam Investment Funds and Putnam Investment Management, LLC (collectively, "Putnam") hereby remove the matter entitled *Steve and Beth Dudley, Individually and on behalf of all others similarly situated, Plaintiffs, v. Putnam Investment Funds and Putnam Investment Management, LLC, Defendants*, cause number 03-L-1540 (hereinafter referred to as "State Court Action"), from the Circuit Court of Madison County, Illinois, to the United States District Court for the Southern District of Illinois. This action is removable under SLUSA because it is a "covered class action" alleging fraud in connection with the purchase or sale of "covered securities," as those terms are defined by SLUSA. The action also is removable on the ground that it presents a

"substantial federal question" in that any duties defendants had with respect to the pricing of shares of the Putnam International New Opportunities Fund arose exclusively under the federal securities laws, and plaintiffs have available remedies under the federal securities laws.

Background of the Action and Plaintiffs' Allegations

1. On November 10, 2003, plaintiffs commenced the State Court Action in the Circuit Court of Madison County, Illinois.

2. Defendants Putnam Investment Funds and Putnam Investment Management, LLC were served with copies of the Summons and Complaint in the State Court Action on November 19, 2003. A copy of all process, pleadings and orders from the State Court Action are attached hereto as Exhibit A. All defendants consent to removal and this Notice of Removal has been filed within thirty days of service of the Summons and Complaint on the first-served defendant.

3. The Complaint concerns the manner in which Putnam allegedly determined the prices at which shares of the Putnam International New Opportunities Fund (the "Fund") would be sold to the investing public. Specifically, plaintiffs allege that:

(a) the Fund is an open-end mutual fund whose shares are sold to investors at prices based upon the net asset value ("NAV") per share plus applicable sales charges (Compl. ¶ 9);

(b) investors may redeem their shares at the NAV of the shares less any redemption charges (Compl. ¶ 9);

(c) defendants recalculate the NAV of the Fund's shares once each business day at the close of trading on the New York Stock Exchange (the "NYSE") at 4:00 p.m. Eastern Time and report the NAV to the National Association of Securities Dealers (the "NASD") for dissemination to the public (Compl. ¶ 11);

(d) securities issued by non-U.S. companies are a significant portion of the Fund's portfolio (Compl. ¶ 12);

(e) the foreign exchanges on which the Fund's non-U.S. securities are traded close from five to fifteen hours ahead of Eastern Standard Time (Compl. ¶ 12);

(f) there is a positive correlation between price movements in the U.S. market and those in the foreign markets such that it is possible to predict the next-day movement of prices in the foreign markets based on the performance of the U.S. market (Compl. ¶ 13);

(g) despite the fact that the prices of the foreign securities held by the Fund are "stale" as of 4:00 p.m. Eastern Time, when the Fund calculates its NAV, and despite the correlation between price movements in the U.S. market and future price movements in the foreign markets, the Fund uses the last trade price in the home market for each of its foreign securities when calculating the daily NAV. (Compl. ¶12, 13, 16.)[1]

4. Plaintiffs contend that defendants' alleged pricing practices for non-U.S. securities "have exposed long term shareholders to market timing traders who regularly purchase and redeem Defendants' shares as part of a profitable trading strategy." (Compl. ¶ 29.) According to plaintiffs,

(a) "market timers who buy Defendants' fund shares on days when the United States market moves up are buying discounted shares at the expense of other fund shareholders because the funds [sic] underlying foreign securities are undervalued as of the time of the share purchase" (Compl. ¶ 30); and

(b) "market timers who sell (redeem) Defendants' fund shares on days when the United States market moves down are selling (redeeming) shares at a premium

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[1] Defendants do not concede the truth of plaintiffs' allegations regarding their policies or practices in pricing foreign securities for purposes of determining the Fund's daily NAV.

at the expense of other fund shareholders because the underlying foreign securities are overvalued as of the time of the sale (redemption). (Compl. ¶ 31.)

5. Plaintiffs claim the activities of the market timers result in dilution of the value of their shares and a transfer of wealth from the long-term buy-and-hold shareholders to the market timers. (Compl. ¶¶ 33, 34.)

6. Based on these allegations, plaintiffs assert two separate counts against defendants:

(a) In Count I of the Complaint, plaintiffs contend that defendants breached their duty of care to plaintiffs by:

(i) "failing to properly evaluate on a daily basis whether a significant event affecting the value of Putnam International New Opportunities Fund's portfolio of securities had occurred after the foreign trading markets for such securities had closed but before Defendants calculated NAV and share prices" (Compl. ¶ 49(a));

(ii) "failing to implement Putnam International New Opportunities Fund's portfolio valuation and share pricing policies and procedures"(Compl. ¶ 49(b); and

(iii) "allowing portfolio valuation and share pricing policies and procedures which benefitted market timing traders of Putnam International New Opportunities Fund's shares at the expense of long term shareholders." (Compl. ¶ 49(c).)

(b) In Count II of the Complaint, plaintiffs contend that defendants acted "with utter indifference and conscious disregard" for plaintiffs' investments and "willfully and wantonly" breached their duties to plaintiffs (Compl. ¶ 54) by:

(i) "failing to know and implement applicable rules and regulations concerning the calculation of NAV" (Compl. ¶ 54(a));

(ii) "failing to properly evaluate on a daily basis whether a significant event affecting the value of Putnam International New Opportunities Fund's portfolio

of securities had occurred after the foreign trading markets for such securities had closed but before Defendants calculated NAV and share prices" (Compl. ¶ 54(b));

(iii) "failing to implement Putnam International New Opportunities Fund's portfolio valuation and share pricing policies and procedures" (Compl. ¶ 54(c)); and

(iv) "allowing portfolio valuation and share pricing policies and procedures which benefitted market timing traders of Putnam International New Opportunities Fund's shares at the expense of long term shareholders." (Compl. ¶ 54(d).)

7. Plaintiffs purport to bring this action on behalf of themselves and a putative class consisting of "all persons in the United States who have held shares of Putnam International New Opportunities Fund for more than fourteen days from the date of purchase to the date of sale (redemption) or exchange ('long term shareholders')." (Compl. ¶ 37.) Plaintiffs assert that the class period begins five years before the date of filing of the Complaint and continues through the date on which the Complaint was filed. (*Id.*)

Grounds for Removal Under SLUSA

8. In 1998 Congress enacted SLUSA, Pub. L. No 105-353, to prevent securities class action plaintiffs from evading the heightened pleading standards of the Private Securities Litigation Reform Act of 1995 (the "PSLRA"), and the PSLRA's mandatory stay of discovery pending resolution of a motion to dismiss, by filing securities class actions in state courts. *Lander v. Hartford Life & Annuity Ins. Co.*, 251 F.3d 101, 107-08 (2d Cir. 2001). SLUSA amended the Securities Act of 1933 (the "1933 Act") and the Securities Exchange Act of 1934 (the "1934 Act").

Those amendments are codified at 15 U.S.C. § 77p(b) and (c) and 15 U.S.C. § 78bb(f)(1) and (2), respectively.[2]

9. SLUSA's amendments to the 1934 Act provide, in pertinent part:

> (1) Class action limitations
>
> No covered class action based upon the statutory or common law of any State or subdivision thereof may be maintained in any State or Federal Court by any private party alleging –
>
> (A) a misrepresentation or omission of material fact in connection with the purchase or sale of a covered security; or
>
> (B) that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security.
>
> (2) Removal of covered class actions
>
> Any covered class action brought in any State court involving a covered security, as set forth in paragraph (1), shall be removable to the Federal district court for the district in which the action is pending, and shall be subject to paragraph (1).

15 U.S.C. § 78bb(f).

10. SLUSA thus makes federal courts the exclusive venue for "covered class actions" alleging fraud in connection with the purchase or sale of "covered securities" and mandates that such class actions be governed exclusively by federal law. *Lander*, 251 F.2d at 108; *see also* H.R. CONF. REP. NO. 105-803, at 13 (1998) (stating that SLUSA "establishes uniform rules for securities class action litigation involving our national capital markets" and that "class actions relating to a 'covered security' . . . alleging fraud or manipulation must be maintained pursuant to

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[2] Citations herein are to the applicable provisions of the 1934 Act, as amended by the SLUSA.

the provisions of Federal securities law, in Federal court").

11. Despite plaintiffs' attempt to avoid removal under SLUSA by couching their Complaint as a state-law breach of fiduciary duty suit on behalf of "holders" of shares of the Fund, a careful examination of plaintiffs' allegations shows that this case falls squarely within the contours of SLUSA.

12. **Covered Class Action.** An action is a "covered class action" for purposes of SLUSA if it involves common questions of law or fact that predominate over any individual questions and is brought (i) on behalf of more than 50 persons or prospective class members" or (ii) on a representative basis by one or more parties suing on behalf of themselves and other unnamed parties similarly situated. 15 U.S.C. § 78bb(f)(5)(B). This action is a "covered class action" within the meaning of SLUSA because the two named plaintiffs purport to bring this action on behalf of themselves and all others similarly situated (Compl. p.1) and allege that "[c]ommon questions of law or fact predominate over any questions affecting only individual members of the Class." (Compl. ¶ 40.)

13. **Covered Securities.** A "covered security" for purposes of SLUSA is one that meets the definition of a "covered security" provided in § 18(b) of the 1933 Act, 15 U.S.C. § 77r(b), at the time the misrepresentation, omission, manipulative act or deceptive conduct is alleged to have occurred. 15 U.S.C. § 78bb(f)(5)(E). The 1933 Act's definition of "covered securities" includes "a security issued by an investment company that is registered, or that has filed a registration statement, under the Investment Company Act of 1940." 15 U.S.C. § 77r(b)(2). The shares of the Putnam International New Opportunities Fund are "covered securities" within the meaning of SLUSA because the shares are issued by an investment company registered under the Investment Company Act of 1940. As set forth in note 1 to the financial statements in the Putnam International New Opportunities Fund's Annual

Report for its fiscal year ended September 30, 2003 (available at Putnam's Website at www.putnam.com): "Putnam International New Opportunities Fund (the 'Fund') is a series of Putnam Investment Funds (the "Trust"), which is registered under the Investment Company Act of 1940, as amended, as a diversified, open-end management investment company."

14. **Alleged Misrepresentations and Omissions of Material Fact.** Plaintiffs allege that defendants "promoted, marketed, and sold shares of the Fund to the investing public nationwide." (Compl. ¶ 2.) Plaintiffs claim that defendants marketed the Fund as having "*the stated goal* of providing long term capital growth to investors who hold shares of the fund." (Compl. ¶ 45 (emphasis added).) Plaintiffs, in essence, contend that this "stated goal" was false because, according to plaintiffs, defendants' practices in calculating the daily NAV of the Fund's shares "have exposed long term shareholders to market timing traders" (Compl. ¶ 29) and have resulted in a "transfer of wealth from the non-trading long term buy and hold shareholders to the market timing traders . . . through dilution." (Compl. ¶ 33.)

15. Plaintiffs further allege that defendants publicly reported the allegedly "artificially inflated" or "artificially deflated" daily NAV to the Fund's shareholders and the investing public by reporting the calculated NAV to the NASD for dissemination to the public (Compl. ¶ 11), and through defendants' interactive Website, which defendants allegedly use to communicate with shareholders regarding the performance of the Fund and the Fund's investments (Compl. ¶ 3.)

16. By contending that defendants misrepresented that the Fund was appropriate for long-term buy-and-hold investors and misrepresented the daily NAV of the Fund's shares plaintiffs have alleged that defendants misrepresented and omitted material facts concerning their investments in, and the value of, the Fund's shares.

17. **Alleged Manipulative Device or Contrivance.** Even if plaintiffs had not alleged any misrepresentations or omissions of material fact, SLUSA does not apply *only* where there are alleged misrepresentations or omissions of material facts. Rather, SLUSA *also* applies to class actions alleging that "the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security." 15 U.S.C. 78bb(f)(1)(B).[3]

18. The essence of plaintiffs' Complaint is that defendants engaged in *manipulation* of the Fund's share prices in that they allegedly caused the share prices to be artificially inflated or deflated at various times by not adjusting the NAV, which they allegedly determined by using the last trade prices on the foreign markets, for "significant events" occurring subsequent to the close of those markets and prior to 4:00 p.m. Eastern Time. (Compl. ¶¶ 49(a), 54(b).) The United States Supreme Court's decision in *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462 (1977), leaves no doubt that defendants' alleged actions constitute "manipulation" within the meaning of Section 10(b) of the 1934 Act. In *Santa Fe* the Supreme Court explained:

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[3] The language of SLUSA tracks the language of Section 10(b) of the 1934 Act, 15 U.S.C. § 78j(b), which makes it unlawful for any person, in connection with the purchase or sale of a security, to use or employ "any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors." Securities and Exchange Commission ("SEC") Rule 10b-5, 17 C.F.R. § 240.10b-5, promulgated under Section 10(b) of the 1934 Act, makes it unlawful for any person, in connection with the purchase or sale of a security "(a) to employ any device, scheme or artifice to defraud, (b) to make any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or (c) to engage in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person."

> Manipulation is "virtually a term of art when used in connection with securities markets." . . . The term refers generally to practices, such as wash sales, matched orders, or rigged prices, that are intended to mislead investors by artificially affecting market activity.

Id. at 476 (emphasis added, citing *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 199 (1976) and 15 U.S.C. § 78i).

19. Thus, the fact that plaintiffs have styled their Complaint as one for alleged breach of fiduciary duties, rather than as a misrepresentation or omission action, does not take this case outside the ambit of the federal securities laws and the removal provisions of SLUSA governing securities class actions. *See, e.g., Denton v. H&R Block Fin. Advisors, Inc.*, 2001 U.S. Dist. LEXIS 15831, at *10 (N.D. Ill. Oct. 3, 2001) ("While it is true that allegations of breach of fiduciary duty alone will not sufficiently plead a securities fraud claim, a breach of fiduciary duty may give rise to a Rule 10b-5 claim where the alleged conduct 'can fairly be viewed as manipulative or deceptive within the meaning of the [Securities Act].") (Kocoras, Chief Judge.) (citing *Santa Fe*, holding that alleged claim for breach of fiduciary duty was preempted by SLUSA and properly removed to federal court, and dismissing the action).[4]

20. **In Connection With the Purchase of Sale of a Security.** SLUSA only preempts claims alleging misrepresentations or omissions of material facts or manipulative or deceptive devices or contrivances that occur "in connection with the purchase or sale" of covered securities. 15 U.S.C. § 88bb(f)(1)(A) and (B) (emphasis added).

21. In an effort to plead around SLUSA's "purchase or sale" requirement, plaintiffs define the proposed class to include "all persons in the United States who have held shares in Putnam International New Opportunities Fund

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[4] District court cases are cited herein by way of example of analysis in similar cases.

for more than fourteen days from the date of purchase to the date of sale (redemption) or exchange ('long term shareholders')." (Compl. ¶ 37 (emphasis added).) Plaintiffs' attempt at artful pleading is unavailing. To avoid removal under SLUSA plaintiffs would have to define the class to include *only* those persons who held shares of the Fund at the beginning of the 5-year class period and continued to hold those shares as of the end of the 5-year class period. The class as defined, however, *also* includes (i) persons who held shares of the Fund at the beginning of the 5-year class period and continued to hold the shares for at least 14-days before selling them during the class period; (ii) persons who purchased shares during the 5-year class period and continued to hold them throughout the entire class period and (iii) persons who purchased shares during the class period and held them for at least 14-days before selling them during the class period.

22. SLUSA applies where the class as defined by plaintiffs *necessarily* includes purchasers and/or sellers of a covered security. *See, e.g., Riley v. Merrill Lynch, Pierce, Fenner & Smith*, 292 F.3d 1334, 1345 (11th Cir. 2002) ("[W]hen a claim that sweeps within its ambit actual purchases and sales of securities is covered by SLUSA, a plaintiff may not avoid SLUSA's restrictions simply by alleging that a given misrepresentation caused him both to purchase and hold a particular security."); *Professional Mgmt. Assocs., Inc. v. KPMG LLP*, 335 F.3d 800, 803 (8th Cir. 2003) (where a complaint implicitly alleges that misrepresentations and omissions were made in connection with the purchase of securities, the plaintiff "cannot avoid preemption by asserting it is only claiming damages suffered as a result of holding its stock"); *Hardy v. Merrill Lynch, Pierce, Fenner & Smith*, 189 F. Supp. 2d 14, 18 (S.D.N.Y. 2001) (finding claims preempted by SLUSA where the class definition necessarily included persons who purchased their shares after Merrill Lynch made allegedly misleading statements, even though class also included persons who already held shares at the time the alleged misstatements were made).

23. The misstatements and omissions of material fact and manipulative practices alleged by plaintiffs also meet SLUSA's requirement that they have been made or occurred "in connection with" the purchases and sales of a covered security. SLUSA does not define the phrase "in connection with"; however, the identical phrase is used in Section 10(b) of the 1934 Act and courts construing SLUSA have looked to case law under the 1934 Act in interpreting this phrase. *See, e.g., Falkowski v. Imation Corp.*, 309 F.3d 1123, 1129 (9th Cir. 2002) (noting that because SLUSA employs language identical to the language of the 1933 and 1934 Acts, "it is logical to look to case law under the 1933 and 1934 Acts as a starting point for interpreting the phrase 'in connection with the purchase or sale'").

24. To satisfy the "in connection with" requirement for purposes of a Section 10(b) claim, a plaintiff need only show that he suffered injury as a result of deceptive practices "touching" his purchase or sale of securities. *Superintendent of Ins. of New York v. Bankers Life & Cas. Co.*, 404 U.S. 6, 12-13 (1971). The Supreme Court repeatedly has held that this requirement must be construed "'not technically and restrictively, but flexibly'" in order to promote Section 10(b)'s remedial purpose. *See Affiliated Ute Citizens of Utah v. Unites States*, 406 U.S. 128, 151 (1972) (quoting *SEC v. Capital Gains Research Bureau*, 375 U.S. 180, 186 (1963)).

25. As plaintiffs allege, shares of open end mutual funds such as the Putnam International New Opportunities Fund are "sold to investors such as Plaintiffs at a price based upon the net asset value ("NAV") per share plus applicable sales charges" and redeemed (bought back by the Fund) "at the NAV of the shares less any redemption charges." (Compl. ¶ 9 (emphasis added).) Class members who bought shares of the Fund at times when the NAV purportedly was "artificially inflated" as a result of defendants' alleged pricing practices, and class members who sold shares at times when the NAV purportedly was "artificially deflated" as a result of defendants' al-

leged pricing practices, would have suffered monetary damages as a result as a result of alleged manipulative practices that "touched" their purchases and sales of shares of the Fund. Plaintiffs' allegations, therefore, meet the "in connection with" requirement of Section 10(b) and SLUSA.

26. In sum, plaintiffs have alleged misrepresentations and omissions of material fact and/or fraudulent devices or contrivances by defendants in connection with the purchases and sales of class members who purchased and/or sold shares of the Fund during the alleged class period. Plaintiffs' claims fall squarely within the four corners of SLUSA and, therefore, are preempted – notwithstanding plaintiffs' attempt to artfully plead their securities class action claims as state-law claims. For these reasons, removal under SLUSA is proper and any motion by plaintiffs to remand should be denied.[5]

Grounds for Removal on the Basis That the Complaint Presents a Substantial Federal Question

27. The artful pleading exception to the well-pleaded complaint rule applies not only where Congress has expressly preempted a field, but also where a plaintiff's complaint presents a "substantial federal question." *Lippitt v. Raymond James Fin. Servs., Inc.*, 340 F.3d 1033, 1041 (9th Cir. 2003) (certain internal citations omitted).

28. Plaintiffs contend that defendants breached their duties to the class by "failing to know and implement applicable rules and regulations concerning the calculation of NAV." (Compl. ¶ 54(a).) However, defendants' duties with respect to the pricing of the Fund's shares arose *exclusively* under federal law. Specifically, SEC Rule 2a-4(a)(1), 17 C.F.R. 270.2a-4(a)(1), promulgated under § 2(a)(41) of the Investment Company Act of 1940, 15 U.S.C. § 80a-2(a)(41), provides that "[p]ortfolio securities

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[5] SLUSA would not prevent the two named plaintiffs from asserting their purported state law claims on an individual basis; rather, it only preempts their ability to assert these claims on a class basis.

with respect to which market quotations are readily available shall be valued at current market value, and other securities and assets shall be valued at fair value as determined in good faith by the board of directors of the registered company." Indeed, plaintiffs allude to Rule 2a-4(a)(1) in paragraph 52 of their Complaint, wherein they allege that applicable regulations governing the pricing of the shares of the Fund were published on or about January 1, 1965.[6]

29. Furthermore, how registered investment companies *should* price the shares of foreign companies under SEC Rule 2a-4 presents a substantial, *disputed* question of federal law. Plaintiffs contend that these shares should be priced at "fair value" rather than at their last trading price as of the close of the foreign exchange. (Compl. ¶ 13.) However, in a 2001 letter to the Investment Company Institute, the SEC noted that "funds generally calculate their NAVs by using the closing prices of portfolio securities on the exchange or market (whether foreign or domestic) on which the securities principally trade." 2001 SEC No-Act LEXIS 543, at *3-4 (Apr. 30, 2001). The SEC further noted that "the closing prices of foreign securities may not reflect their market values at a fund's NAV calculation if an event that will affect the value of those securities ("significant event") has occurred since the closing prices were established on the foreign exchange or market, but before the fund's NAV calculation." *Id.* The SEC, therefore, concluded that if a fund determines that a "significant event" has occurred since the closing of the foreign market but before calculation of the fund's NAV, the fund must value the foreign security pursuant to a fair value pricing methodology. *Id.* at *8. Notably, however, the SEC declined to define what constitutes a "significant event" requiring "fair value pricing" of foreign securities. *Id.* at * 10-11.

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[6] SEC Rule 2a-4 was published in the Federal Register on December 30, 1964. *See* 29 FR 19101.

30. The issue of what constitutes a "significant event" requiring "fair value pricing" of foreign shares held in a mutual fund's portfolio implicates important federal interests. Indeed, Congress repeatedly has indicated its intent that nationally marketed securities should be governed by *uniform standards*. *See, e.g., Patneaude v. Equitable Life Assurance Soc'y*, 290 F.3d 1020, 1026 (9th Cir. 2002) (explaining that the PSLRA, the National Securities Markets Improvements Act of 1996, and SLUSA, "demonstrate that Congress intended to provide national, uniform standards for securities markets and nationally marketed securities"). Accordingly, the issue of how mutual funds should price the shares of foreign securities under SEC Rule 2a-4 should be decided by the federal courts, not the various state courts. *Cf. D'Alessio v. NYSE, Inc.*, 258 F.3d 93 (2d Cir. 2001) (holding that claims "arose under" federal law where claims were predicated on alleged breached of certain duties imposed on the NYSE by the 1934 Act and would require a court to interpret federal law governing securities trading on a national exchange); *see also, e.g., Sparta Surgical Corp. v. NASD, Inc.*, 159 F.3d 1209, 1212 (9th Cir. 1998) ("[A]lthough Sparta's theories are posited as state law claims, they are founded on the defendants' conduct in suspending trading and de-listing the offering, the propriety of which must be exclusively determined by federal law.")

31. The Seventh Circuit, interpreting the Supreme Court's decision in *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804 (1986), has held that for a complaint to present a "substantial federal question" such that complete preemption may be found to exist, the plaintiff must have a private right of action under federal law. *See Seinfeld v. Austen*, 39 F.2d 761, 764 (7th Cir. 1994) ("Under *Merrell Dow* . . . 'if federal law does not provide a private right of action, then a state law action based on its violation perforce does not raise a "substantial" federal question.'" (quoting *Utley v. Varian Assocs., Inc.*, 811 F.2d 1279, 1283 (9th Cir.), *cert. denied*, 484 U.S. 824 (1987)); *see also Rogers v. Tyson Foods, Inc.*, 308 F.3d

785, 788 (7th Cir. 2002) ("Most circuits share our view that the existence of a private right of action under federal law is an antecedent of complete preemption.").

32. There are ample federal remedies available to plaintiffs with respect to the alleged conduct and harm of which they complain in this action. Indeed, myriad federal securities class actions have been filed in various United States district courts on behalf of shareholders of Putnam mutual funds, including the Putnam International Equity Fund, alleging violations of various provisions of the federal securities laws in connection with the very same NAV pricing practices at issue in this action. On November 12, 2003, the Putnam defendants, including the two defendants named in this action, filed a motion with the Judicial Panel on Multidistrict Litigation seeking the transfer of the various actions to the United States District Court for the District of Massachusetts for coordinated or consolidated pretrial proceedings. As of that date, five actions were pending in the District of Massachusetts, six actions were pending in the Southern District of New York, and one action had been removed from this Court to the Southern District of Illinois. On November 24, 2003, the Putnam defendants filed a Notice of Related Actions with the Judicial Panel seeking the transfer of two additional actions filed in the District of Massachusetts and one additional action filed in the Southern District New York. On November 25, 2003, the Putnam defendants filed an additional Notice of Related Actions with the Judicial Panel seeking the transfer of six additional actions pending in the Southern District of New York, one additional action pending in the District of Massachusetts and one additional action pending in the Northern District of California. The Judicial Panel has not yet ruled on the Putnam defendants' motion.

33. To conclude, because plaintiffs' claims are predicated on alleged violations of federal law, because there are substantial disputed questions as to the interpretation of that law, and because plaintiffs have remedies available to them under federal law, the Court should find

that removal is proper on the ground that this action presents a "substantial federal question," as well as on the ground that plaintiffs' state-law class action claims are preempted by SLUSA.

Dated: December 15, 2003

[attorney name and address blocks omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

Civil No. 04-CV-56-DRH

AVERY JACKSON, INDIVIDUALLY AND
ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Plaintiffs,

v.

VAN KAMPEN SERIES FUND, INC. AND
VAN KAMPEN INVESTMENT ADVISORY CORP.,
Defendants.

[Filed Jan. 22, 2004]

NOTICE OF REMOVAL

Pursuant to 28 U.S.C. § 1441, Defendants Van Kampen Investment Advisory Corp. and Van Kampen Series Fund, Inc., hereby notice the removal to this Court of Cause No. 03 L 2036 from the Circuit Court of Madison County, Illinois. In support of this notice, Defendants allege as follows:

1. Plaintiff initiated this action by filing a Summons and Complaint naming Defendants in the Circuit Court of Madison County, Illinois (the "State Court"). Pursuant to 28 U.S.C. § 1446(a), a complete copy of the State Court file in this action is attached hereto as Exhibit A, which consists of true and correct copies of the Summons and Complaint. No other proceedings have taken place in State Court as of the date of the filing of this Notice.

2. Defendant Van Kampen Investment Advisory Corp. was served with a copy of the Summons and Complaint on December 24, 2003. Defendant Van Kampen Series Fund, Inc. was served with a copy of the Summons and Complaint on December 29, 2003. Pursuant to 28

U.S.C. § 1446(b), Defendants timely file this Notice within thirty (30) days of the receipt through service of Plaintiff's Summons and Complaint by the first Defendant to be served. All Defendants consent to removal.

3. Pursuant to 28 U.S.C. § 1446(d), Defendants are filing a copy of this Notice with the Clerk of the Circuit Court of Madison County, Illinois and have served a copy on Plaintiff.

4. Venue is proper under 28 U.S.C. § 1446(a) because this case is pending in the Circuit Court of Madison County, Illinois. This Court is the district and division "embracing the place where [the State Court] action is pending." 28 U.S.C. § 1441(a).

5. As set forth below, removal of this action is proper under 28 U.S.C. §§ 1331 and 1441 because the Securities Litigation Uniform Standards Act of 1998 ("SLUSA") confers jurisdiction and because the Complaint presents a substantial federal question.

6. In his Complaint, Plaintiff alleges that Defendants priced shares in the Van Kampen International Magnum Fund based on the net asset value ("NAV") of the Fund, which was determined once per day at the close of trading on the New York Stock Exchange. According to Plaintiff, Defendants failed to consider various factors in determining the NAV, and this failure by Defendants exposed him and other shareholders in the Fund to market timing traders, thereby diluting the value of their holdings and voting rights. *See* Compl., ¶¶ 9-12, 28-36.

7. Plaintiff alleges that Defendants' conduct in determining the NAV amounted to a breach of fiduciary duty owed to shareholders of the Van Kampen International Magnum Fund. *Id.*, ¶¶ 48-50, 52-54.

8. Plaintiff purports to bring this action on behalf of himself and a putative class consisting of all other persons in the United States who have held shares in the Van Kampen International Magnum Fund for more than fourteen days at any time during the last five years. *Id.*, ¶¶ 37-43. Thus, this class includes individuals who pur-

chased and sold shares of the Van Kampen International Magnum Fund during this time period.

SLUSA Confers Jurisdiction

9. This Court has original jurisdiction over this action pursuant to SLUSA, and thus, this action is removable pursuant to 15 U.S.C. §§ 77p(c) and 78bb(f)(2) and 28 U.S.C. §§ 1331 and 1441.

10. Under SLUSA, federal courts are the exclusive venue for "covered class actions" alleging fraud in connection with the purchase or sale of "covered securities." 15 U.S.C. §§ 77p(b)-(c) and 78bb(f). In order for SLUSA to apply, (1) the action must be a "covered class action," (2) the plaintiff's claims must be based on state law, (3) the action must involve a "covered security," and (4) the plaintiff must allege that the defendant made misrepresentations or omissions of material fact or used a manipulative or deceptive device in connection with the purchase or sale of covered securities. *See Riley v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 292 F.3d 1334, 1342 (11th Cir. 2002); *see also Lander v. Hartford Life & Annuity Ins. Co.*, 251 F.3d 101, 107-08 (2d Cir. 2001). Plaintiff's Complaint satisfies each of these elements.

11. First, this action is a "covered class action" under SLUSA because Plaintiff seeks to recover damages for himself and on behalf of an alleged class of unnamed other shareholders in the Van Kampen International Magnum Fund who are similarly situated, (Compl., ¶¶ 37-43), and because Plaintiff alleges that questions of law and fact common to the members of the alleged class predominate over any questions affecting only individual persons or alleged class members. *Id.*, ¶ 40. *See* 15 U.S.C. § 78bb(f)(5)(B).

12. Second, Plaintiff's claims are state law claims based on Defendants' alleged negligence and alleged breach of fiduciary duties under Illinois state law. *See* Compl., ¶¶ 48-50, 52-54.

13. Third, this action involves a "covered security" under SLUSA because shares of the Van Kampen Interna-

tional Magnum Fund are offered by an investment company registered under the Investment Company Act of 1940. *See* 15 U.S.C. § 78bb(f)(5)(E).

14. Fourth, Plaintiff alleges misrepresentations or omissions of material fact by Defendants in connection with the purchase or sale of covered securities (Compl., ¶¶ 8, 29, 33-34, 45, 49, 53), and that Defendants used or employed a manipulative or deceptive device or contrivance in connection with the purchase or sale of covered securities. *Id.*, ¶¶ 29, 34-35, 49, 53.

15. Specifically, Plaintiff alleges that Defendants "have been tremendously successful in convincing investors such as Plaintiff to hold their fund shares by urging investors to invest for the long term and by effectively marketing the various advantages of long term ownership of funds over direct investment. . . ." *Id.*, ¶ 8. Further, Plaintiff alleges that Defendants operated the Van Kampen International Magnum Fund "with the stated goal of providing long term capital growth to investors who hold shares of the fund." *Id.*, ¶ 45. Plaintiff alleges that these representations were false because Defendants "use[d] stale prices in valuing their fund shares and setting their daily NAVs . . . expos[ing] long term shareholders to market timing traders who regularly purchase and redeem Defendants' shares as part of a profitable trading strategy." *Id.*, ¶ 29.

16. Similarly, Plaintiff alleges that Defendants manipulated the pricing of shares in the Van Kampen International Magnum Fund by "failing to make daily adjustments based upon positive correlations between upward or downward movements in United States and foreign markets and by choosing to use stale prices in valuing their fund shares and daily NAVs . . ." *Id.*, ¶ 29. Plaintiff contends that Defendants' practices caused "[l]ong term shareholders [to] suffer a dilution of their equity interests and voting rights . . . ." *Id.*, ¶ 34.

17. Plaintiff alleges that Defendants' alleged misconduct occurred in connection with the purchase or sale of

covered securities because Plaintiff's proposed class includes persons who purchased or sold shares in the Van Kampen International Magnum Fund during the purported class period. *See, e.g., Riley*, 292 F.3d at 1345 ("[W]hen a claim that sweeps within its ambit actual purchases or sales of stock *is* covered by SLUSA, a plaintiff may not avoid SLUSA's restrictions simply by alleging that a given misrepresentation caused him to *both* to purchase and hold a particular security.") (emphasis in original); *Hardy v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 189 F. Supp. 2d 14, 19-20 (S.D.N.Y. 2001) (denying motion to remand because the plaintiff's purported class included, not only persons who held on to their stock as a result of the defendant's alleged misrepresentations, but also persons who purchased shares after the defendant's alleged misrepresentations).

The Complaint Presents a Substantial Federal Question

18. Removal also is appropriate in this case because the merits of Plaintiff's Complaint turn on a substantial issue of federal law. As the United States Supreme Court recognized in *Franchise Tax Bd. of the State of California v. Construction Laborers Vacation Trust for Southern California*, 463 U.S. 1, 13 (1983), even though a plaintiff might plead its claims under state law, its "case might still 'arise under' the laws of the United States if a well-pleaded complaint established that its right to relief under state law requires resolution of a substantial question of federal law in dispute between the parties."

19. In this case, Plaintiff alleges that Defendants "fail[ed] to implement [the Fund's] portfolio valuation and share pricing policies and procedures. . . ." *See* Compl., ¶ 53(iii). These policies and procedures are defined by reference to federal law, including SEC Rule 2a-4(a)(1). However, the question of how registered investment companies should price shares of foreign companies under SEC Rule 2a-4(a)(1) is a substantial, disputed question of federal law. *See, e.g.*, 2001 SEC No-Act LEXIS 543, at *3-

4, 10-11 (Apr. 30, 2001) (determining that if a "significant event" has occurred since the closing of a foreign market but before the calculation of an investment fund's NAV, the fund must value the relevant foreign securities pursuant to "fair value pricing" methodology, but declining to define what constitutes a "significant event" requiring "fair value pricing" of foreign securities).

20. Accordingly, removal is appropriate because Plaintiff's Complaint presents a substantial federal question.

Dated this 22th day of January, 2004.

[attorney name and address blocks omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

Civil No. 04-CV-355-MJR

TERRY SPURGEON, AS CUSTODIAN FOR THE BENEFIT OF JAMES E. SPURGEON, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Plaintiff,

v.

PACIFIC LIFE INSURANCE COMPANY,
Defendant.

[Filed May 21, 2004]

NOTICE OF REMOVAL

Pursuant to 28 U.S.C. §§ 1441 and 1446, Defendant PACIFIC LIFE INSURANCE COMPANY ("Pacific Life") files this Notice of Removal. In further support of this removal petition, defendant relies on the Declaration of Adrian Griggs, filed herewith.

I. INTRODUCTION

1. Plaintiff dismissed an earlier complaint while it was pending in this Court but before this Court had made any rulings. The specific allegations in his new complaint and defendant's support of this Notice of Removal present many issues and arguments this Court has not had the opportunity to consider before, notwithstanding the number of market-timing securities cases that various parties have attempted to remove to this Court in previous months.

2. We remove on the following grounds:

• Complete preemption by the National Securities Markets Improvement Act of 1996. This statute replaced

the dual federal and state regulation of securities and provided for nationwide securities to be regulated under federal law, and state or regional securities to be regulated under state law. See Pt. IV.A.1.

• Complete preemption by the Investment Company Act of 1940. This Notice analyzes the interaction of the Act's express preemption and substantive provisions. Congress, for example, demonstrated its intent to exclude state jurisdiction over regulation of how securities prices are set by allocating regulatory control elsewhere – to private securities associations, subject to displacement only by the Securities Exchange Commission ("SEC"). Congress' empowerment of entities ordinarily subject to state jurisdiction underscores its intent to displace state regulation in this area. See Pt. IV.A.2.

• Complete preemption by the Securities Litigation Uniform Standards Act. The claims here are within the statute's scope because they are "in connection with" the purchases and sales of securities by market timers. This Notice demonstrates that Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975) is not to the contrary – that Blue Chip Stamp's limitation of private Section 10(b) actions to purchasers and sellers of securities was *not* an interpretation of the statute's "in connection with" language, but a judge-made rule to limit what it viewed as vexatious litigation. The Supreme Court said so expressly at the time and has reconfirmed it since, and has, in fact, consistently found that Section 10(b)'s "in connection with" language is satisfied by securities transactions by defendants or co-conspirators. This Notice then discusses the implications for SLUSA preemption in this case. See Pt. IV.A.3.

• Diversity based on plaintiff's request for injunctive relief. Plaintiff's stealth request for injunctive relief is not hidden by calling it "any other relief" the Court deems appropriate under Cal. Bus. & Prof. § 17200 because injunctive relief is the only "other" relief available under the

statute, that the plaintiff had not already specifically requested. See Pt. IV.B.

- Diversity based on plaintiff's allegations of claims belonging to Pacific Select Fund. Under Massachusetts law, which is applicable here, claims of mismanagement and breach of fiduciary duty belong only to the corporation or fund. Shareholders or investors injured only in the form of a loss in investment value can bring derivative claims only. See Pt. IV.B.

II. PROCEEDINGS TO DATE

3. On March 12, 2004, plaintiff Terry Spurgeon, "as custodian for the benefit of James E. Spurgeon II," individually and on behalf of all others similarly situated, filed suit against Pacific Life in the Circuit Court of the Third Judicial Circuit, Madison County, Illinois. True and correct copies of all documents in the state court file are attached hereto as Exhibit A. The plaintiff served Pacific Life on May 10, 2004. Pacific Life timely files this notice of removal within the thirty days set forth in 28 U.S.C. § 1446(b).

III. THE NATURE OF THIS ACTION

4. Plaintiff has sued as custodian for the benefit of his son. He is a resident and citizen of Moro, Illinois. Complaint ¶ 1. Defendant, an insurance company organized under the laws of California, with its principal place of business in Newport Beach, California, is a citizen of California. Complaint ¶ 3; Declaration of Adrian Griggs, attached hereto, at ¶ 4.

5. Plaintiff's claims concern variable annuity contracts issued by Pacific Life to investors in 49 states and the District of Columbia, in which the contract holders have allocated premium payments and accumulated proceeds to mutual fund portfolios. Such amounts are held in a "Separate Account;" which segregates assets attributable to the contracts from assets in Pacific Life's general account. The Separate Account is subdivided into "subaccounts," each of which invests in a mutual fund portfolio, and owners of variable annuity contracts allocate their

premiums and account value among subaccounts, and, in so doing, direct the proceeds of their contracts to the mutual funds. Contract holders may transfer among the subaccounts, effectively "selling" units (shares) in one and "buying" units in another, at prices set each day based on the value assigned to each subaccount, which is derived from the net asset value per share of the underlying mutual fund portfolio. Complaint ¶¶ 4, 10, 11, 13, 14, 18; Griggs Decl. ¶ 5.

6. Pacific Life registers the interests in the Separate Account with the SEC as securities under the Securities Act of 1933 and registers the Separate Account as a Unit Investment Trust with the SEC under the Investment Company Act of 1940. Pacific Life is registered as an investment adviser under the Investment Advisers Act of 1940. Most of the portfolios available to contract holders are offered by Pacific Select Fund, a Massachusetts Business Trust which is registered as an open-end management investment company with the SEC under the Investment Company Act of 1940. Griggs Decl. ¶ 6. Pacific Life is the investment advisor for the mutual fund portfolios, but subcontracts management of most of the portfolios to subadvisors. Complaint ¶ 22.

7. Plaintiff alleges that market-timed trades in the mutual fund portfolios that included securities listed on foreign exchanges occurred because Pacific Life inaccurately valued subaccounts based on the most recent available market prices rather than by estimating prices based on the potential impact of fluctuation in the United States and world equity markets, in the value of American Depository Receipts, and in foreign currency futures markets. He further alleges that market timers captured an arbitrage profit that resulted in lower values for units held by other investors. Complaint ¶¶ 32, 35, 36, 37. Plaintiff purports to represent a nationwide class of those who, through ownership of any Pacific Life variable annuity product, held units in any subaccount invested in a fund including foreign securities that experienced market-

timed trading. Id. at ¶ 39. Plaintiff seeks certification of this class under 735 Ill. Comp. Stat. 5/2-801.

8. Plaintiff purchased an individual flexible premium deferred variable annuity contract from Pacific Life for his then-minor son pursuant to the Uniform Gifts to Minors Act. Complaint ¶ 2. Plaintiff alleges that he held units in the Lazard International Value Fund subaccount at all times relevant to this complaint; the relevant time period is not specified. Id. ¶ 38.

9. Plaintiff asserts four claims. Counts I and II allege negligence and gross negligence in determining the net asset value of subaccounts (and therefore prices for their units), and in permitting market-timed trades. Count III alleges breach of fiduciary duty for using market prices to determine the net asset value of subaccounts (and their units), for permitting market-timed trading; and for failing to disclose information about such trading and its potential impact. Plaintiff does not specify which state's common law is invoked. Complaint ¶¶ 53, 57, 62. Count IV alleges violations of Calif. Bus. & Prof. § 17200 on the grounds that Pacific Life's valuation and unit pricing practices were unlawful, unfair, and/or fraudulent business acts or practices within the meaning of the statute. Complaint ¶¶ 66, 74.

10. For Counts I, II, and III, plaintiff asks for compensatory damages, attorneys' fees, interest, and costs. For Count IV, plaintiff asks for restitution, costs, attorneys' fees, interest, *and* "any other relief" the Court deems appropriate in accordance with Cal. Bus. & Prof. § 17200. Complaint pp. 15-16. Plaintiff's request for "any other relief" for Count IV is a request for injunctive relief. Plaintiff limits the monetary relief requested to $75,000 per plaintiff or class member, exclusive of costs, fees, and interest. Complaint pp. 11, 12, 13, 16.

11. Although plaintiff purports to allege only state law claims, the rules he is attempting to impose – how nationally traded securities may be valued, how nationally traded securities in variable annuity contracts may be

transferred (i.e., bought and sold), and what must be disclosed about the nature and risks of investing in such securities to prospective and existing investors – are regulatory issues governed exclusively by federal securities laws.

IV. THE GROUNDS FOR REMOVAL

12. This Court has original jurisdiction over this civil action pursuant to 28 U.S.C. § 1331, federal question jurisdiction, and § 1332, diversity jurisdiction.

A. Federal Question Jurisdiction

13. This Court has federal question jurisdiction because the asserted state law claims are completely preempted by the National Securities Markets Improvement Act of 1996 ("NSMIA"), which replaced the former preemption/savings provision of the Securities Act of 1933 ("Securities Act") with a new preemption/savings provision, codified at 15 U.S.C. § 77r; and by the Investment Company Act of 1940 ("1940 Act"), codified at 15 U.S.C. § 80a-1 et seq., and SEC regulations adopted pursuant to it. In addition, the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"), codified at 15 U.S.C. §§ 77p & 78bb(f), independently provides the basis for removal of this class action. Because these statutes wholly displace state jurisdiction over the matters plaintiff raises, his claims are considered to arise under federal law and are removable under 28 U.S.C. § 1441(b). The Supreme Court recently reconfirmed this view in Beneficial Nat'l Bank v. Anderson, 539 U.S. 1, 123 S. Ct. 2058, 2063 (2003).

(1) NSMIA- Section 18 of the Securities Act

14. All of plaintiff's claims are preempted by NSMIA – the claims that state law imposes obligations to disclose information about these securities, Complaint ¶ 62(e)& (f), the claims that state law imposes obligations as to the required methods of calculating subaccount unit (share) prices, Complaint ¶¶ 53, 57, 62, 65-76, and the claims that state law imposes an obligation to prevent market-timed trades from occurring, Complaint ¶¶ 53(e), 57(e), 62(g).

15. In 1996, Congress vested sole regulatory power over most regulation of *nationwide* securities in the SEC. See NSMIA, PL 104-290, 110 Stat. 3417 (1996). Congress determined that dual federal and state regulation was "redundant, costly, and ineffective," and concluded that "this duplicative regulation tends to raise the cost of capital to American issuers of securities without providing commensurate protection to investors or to our markets." H.R. Conf. Rep. No. 104-864 at 39 (1996). Therefore, Congress provided for securities that "are inherently national in nature" to be "subject to only Federal regulation," with states retaining power only to regulate intrastate and regional securities. Id. at 40.

16. Section 102 of NSMIA, entitled "Creation of National Securities Markets," replaced a provision preserving state regulation of securities, with a new Section 18 that expressly *preempts* state regulation if it directly or indirectly attempts to regulate what information must be disclosed about nationwide securities or directly or indirectly attempts to regulate the nature and quality of nationwide securities.

17. The statute defines which securities are considered nationwide and therefore exempt from such state regulation. The securities at issue here are exempt because they are issued by investment companies registered with the SEC. § 77r(b)(2), see, supra, ¶ 11.

18. Congress has occupied the entire field of disclosure obligations regarding what must be included in descriptions of nationally-traded securities. All state law that imposes disclosure requirements on nationally traded securities is completely preempted, whether it imposes requirements or conditions on an offering document directly by specific statutory language, or indirectly through tort law or general consumer protection statutes. See § 77r(a)(2)(A). Offering documents include any document that describes the securities that are available to investors, such as a prospectus, a statement of additional information, advertising, or sales literature. See § 77r(d)(1);

H.R. Rep. No. 104-622 at 30 (1996) (the provision "prohibits States from placing limits or imposing conditions upon . . . the use of offering documents . . . including advertising or sales literature used in connection with such offerings"). The disclosure claims plaintiff asserts in ¶ 62(e) and (f) of his complaint fall squarely within this preempted cause of action, and are thus removable under 28 U.S.C. § 1441.

19. Congress has similarly displaced state regulation of the standards that nationwide securities must meet. Any state law that limits or imposes any condition on the offer or sale of any security based on its merits is preempted, whether the state law pursues this result *directly or indirectly*. § 77r(a)(3). "Offer" and "sale" are defined in the statute as referring to *every* attempt to offer to dispose of or to buy a security or interest in a security for value. § 77b(a)(3).

20. A state tort law or statute that attempts to protect securities from dilution, by imposing a duty on an investment company or adviser to use particular methods of valuation or to prevent market-trading, falls within this preemption. Such a law aims at regulating the security's merit by improving investor returns (i.e., allegedly higher if there are fewer or no market-timed trades). A state imposing such rules therefore subjects investment companies to a choice between selling only securities that meet these standards – securities for which prices are set or trades are processed by the state-mandated methods – or risking punishment. Such state rules therefore seek to achieve *indirectly* the same result the state allegedly would achieve by reviewing securities on the basis of merit and imposing the conditions that they may be sold only if the investment companies undertake specified methods of valuation, or specific methods of preventing market-timed trades, or a guarantee that there will be no market-timed trades.

21. Because the claims plaintiff asserts in ¶¶ 53(a)-(e), 57 (a)-(e), 62 (a)-(g), and Count IV of the complaint ask

the Court to fashion exactly such duties from state tort law and California's statute, these claims fall squarely within this preempted cause of action and would, if found, be displaced by Section 18. They are therefore removable under 28 U.S.C. § 1441.

22. None of the exceptions provided in the new Section 18 apply here. States retain jurisdiction to bring enforcement actions for fraud, deceit, or unlawful conduct by a broker or dealer, in connection with securities or securities transactions. See § 77r(c)(1). Plaintiff, however, has not brought any claims under state fraud law, has not claimed that he or any class member was deceived, and has expressly disclaimed claims of any kind arising from plaintiff's or class member's purchase or sale of Pacific Life variable annuities or subaccount units. Complaint ¶ 40. Plaintiff's one mention of fraud, in Count IV, as a component of Cal. Bus. & Prof. § 17200, complains only about the general valuation and unit pricing policies and practices used by Pacific Life which plaintiff alleges resulted in lower quality securities than if there had been different valuation and pricing practices. There is no allegation that plaintiff or any class member was defrauded or deceived. Complaint ¶¶ 65, 66, 73.

23. In any event, the new Section 18 does not permit states to use their anti-fraud authority to regulate the quality of securities, as Congress made clear. See H.R. Rep. No. 104-622 at 34 (1996) ("In preserving State law against fraud and deceit, (including broker-dealer sales practice abuse), however, the Committee intends to prevent the States from indirectly doing what they have been prohibited from doing directly"); id. ("The legislation preempts authority that would allow the States to employ the regulatory authority they retain to reconstruct in a different form the regulatory regime for covered securities that Section 18 has preempted"); S. Rep. No. 104-293 at 6-7 (1996) ("The Committee clearly does not intend for the 'policing' authority to provide states with a means to undo the state preemption."). The only other state authority

preserved permits states to require notice filing and filing fees. See § 77r(c)(2).

(2) 1940 Act and SEC regulations adopted thereunder

24. Removal of the valuation claims asserted by plaintiff, Complaint ¶¶ 53(a)-(d), 57(a)-(d), 62(a)-(d), 65-77, is independently warranted under the 1940 Act because the 1940 Act and SEC regulations adopted pursuant to it completely preempt the field of regulation over determinations of net asset values of mutual fund portfolios and subaccount unit (share) prices.

25. The 1940 Act contains an express preemption/savings clause providing for states to retain jurisdiction over investment companies and the securities they issue only "insofar as such jurisdiction does not conflict with any provision of this title or of any rule, regulation, or order hereunder." See 15 U.S.C. § 80a-50.

26. Exercise of state jurisdiction over which pricing methods must be used to determine net asset values of mutual fund portfolios or unit (share) prices would conflict with the regulatory choices Congress enacted in the 1940 Act and is therefore completely preempted.

27. The 1940 Act expressly commits the regulatory role over valuation of securities to private securities associations and a federal agency. The Act permits associations to establish the rules by which their members set the prices of their own securities, see § 80a-22(a), and then commits the ultimate regulatory role over securities' valuation to the SEC, see § 80a-22(c). See also United States v. Nat'l Ass'n of Sec. Dealers, 422 U.S. 694, 710 & n.19 (1975) ("NASD"). State regulation of how the net asset values of funds and the pricing of units must be determined would conflict with the statutory provisions affirmatively conferring that power elsewhere.

28. State exercise of jurisdiction over valuation is also irreconcilable with Congress' decision to empower private associations to set those rules for their members, because private associations and their members are ordinarily

subject to state-imposed requirements. By providing instead for industry self-regulation through these associations, restrained only by the SEC's authority to override, Congress excluded state jurisdiction over the same subject matter.

29. Congress additionally excluded state jurisdiction by setting forth the rules governing valuation in the 1940 Act itself, subject to interpretation and adjustment only by the SEC. See §§ 80a-22(a), (c) (providing for prices to be set in relation to net asset value of securities), 80a-2(41) (defining how net asset value is to be computed).

30. The Seventh Circuit recently found state jurisdiction completely preempted based on far less specific provisions governing telephone service pricing. See Boomer v. AT&T Corp., 309 F.3d 404, 417-18 (7th Cir. 2002). The court ruled that the federal statutory requirement providing that long distance rates must be just and reasonable demonstrated "Congress's intent that federal law govern" long distance rates. The court further found that the scope of that preemption also included "the validity of the terms and conditions of long-distance service contracts," and therefore no challenge to the validity of the terms and conditions of long-distance telephone service agreements could be maintained under state law. Congress demonstrated its intent that federal law govern how securities are priced even more clearly – by requiring securities to be priced in relation to net asset value, setting forth how net asset value must be determined, and by expressly delegating the sole authority to adjust these rules to the SEC.

31. State jurisdiction is independently preempted by SEC regulations, 17 C.F.R. §§ 270.22c-1 & 270.2a-4, especially in light of Congress' express provision for SEC regulations to displace state jurisdiction. 15 U.S.C. § 80a-50. The SEC regulations define how current net asset values are to be determined, when net asset values and securities' prices may be determined, and how they apply to purchase or redemption orders (the "forward pricing"

rule). See also SEC Release 33-8408 (April 16, 2004) (addressing market timing). These regulations leave no room for state jurisdiction over this subject matter.

32. Significantly, the 1940 Act was aimed at the same harm that plaintiff alleges – the danger of dilution if securities are not priced appropriately. See H.R. Rep. No. 76-2639 at 8 (1940) (explaining that the method of pricing securities of open-end companies "may tend at times to substantial dilution of the investors' equity in the companies"); Investment Trusts and Investment Companies: Hearing before the Senate Subcommittee on Securities and Exchange of the Banking and Currency Committee, 76th Congress, 121-58 at 289 (1940) (statement of David Schenker, Chief Counsel, Securities and Exchange Commission, Investment Trust Study); NASD, 422 U.S. at 709 (Section 22 of the Investment Company Act of 1940 was enacted to eliminate or reduce so far as reasonably practicable dilution or other harms to holders of outstanding mutual fund securities resulting from the purchase or sale of such securities).

33. However, the 1940 Act also demonstrates that Congress was concerned with balancing its interest in protecting investors from dilution with its interest in allowing the securities markets to perform their important functions in interstate commerce. Thus, Congress expressly provided that securities associations, and the SEC, should set rules that would eliminate or reduce dilution "*so far as reasonably practicable*." § 80a-22(a) (emphasis added); § 80a-22(c) (referencing § 80a-22(a)); H.R. Rep. No. 76-2639 at 20 (explaining that Section 22 was intended to protect investors "so far as is reasonably practicable, against any dilution of their equity due to the methods of pricing, distribution, and redemption of redeemable securities issued by investment companies"). Congress has since amended the 1940 Act to insist that the SEC affirmatively weigh the goals of promoting "efficiency, competition, and capital formation" whenever it considers rules to protect investors. § 80a-2(c).

34. Congress' actions in setting forth basic pricing rules for securities and committing any additional regulatory role to private associations and the SEC – rather than to states – reflects not only the importance of uniform national rules, but also Congress's intention that protective and practical market interests be balanced by regulators it could trust, or require, to do so. Because Congress left no room for states to regulate the pricing of securities, plaintiff's claims with respect to Pacific Life's pricing of subaccount units are completely preempted, arising – if at all – under federal law, and are therefore removable under 28 U.S.C. § 1441.

35. This Court's jurisdiction over the valuation and pricing claims also establishes an additional basis for jurisdiction, under 28 U.S.C. § 1367(a), over the few remaining claims. As plaintiff makes clear by including pricing and non-pricing claims in the same counts, all the claims arise from the same alleged facts and are part of the same controversy.

(3) SLUSA

36. SLUSA expressly provides for removal here. 15 U.S.C. §§ 77p(c), 78bb(f)(2).

37. Plaintiff has attempted to avoid SLUSA by excluding claims based on conduct in connection with purchases or sales of Pacific Life's annuities and subaccount units by *plaintiff* and *class members*. Complaint ¶ 40. However, excluding some claims that would have come within SLUSA has not, in fact, avoided SLUSA here because the claims plaintiff *has* brought are within SLUSA. Plaintiff's claims all allege misconduct in connection with purchases or sales of Pacific Life subaccount units by *market timers*. Further, plaintiff alleges that Pacific Life was a "co-participant" with market timers, engaged in a manipulative scheme to assign incorrect values to subaccount units in order to permit "favored" market timing investors to engage in profitable securities trades that hurt other investors. Complaint ¶¶ 52, 53, 56, 57, 62, 67, 69, 72, 74, 76.

38. These allegations place plaintiff's lawsuit precisely within SLUSA because plaintiff's claim, that Pacific Life allegedly worked in cahoots with market timers to their and Pacific Life's enrichment, alleges a manipulative contrivance in connection with the purchase and sale of securities. See 15 U.S.C. §§ 77p(b)(2), 78bb(f)(1)(B).

39. SLUSA's "in connection with the purchase or sale of a covered security" language only excludes allegations of misconduct that involve no one's purchase or sale of securities, such as a complaint about being misled into not buying shares.

40. SLUSA does *not* exclude suits involving purchases or sales of securities by non-plaintiffs, either expressly or by analogy to Section 10(b) of the Securities Exchange Act of 1934 under Blue Chip Stamps.

41. As this Court has recognized, the "in connection with" language in SLUSA is intended to be coextensive with the almost identical language in Section 10(b). However, it is long settled that Section 10(b) is satisfied by securities trades made by defendants or even by their co-conspirators – and is not limited to securities' trades by those who were deceived. Thus, insider trading has long been held to violate Section 10(b) (and SEC Rule 10b-5) because it involves an insider's breach of duty in connection with his *own* purchase or sale of securities. See, e.g., Dirks v. SEC, 463 U.S. 646, 660 (1983); Carpenter v. United States, 484 U.S. 19 (1987) (affirming conviction under Section 10(b) and Rule 10b-5 of a columnist who breached his duty to his newspaper, based on securities trades by his co-participants).

42. Blue Chip Stamps certainly limited private actions under Section 10(b) and Rule 10b-5 to purchasers and sellers of securities but it was not interpreting the statute's "in connection with" language in reaching that conclusion. Blue Chip Stamps fashioned a judge-made rule to limit the implied right of action that courts, rather than Congress, had earlier supplied – after determining that the rule was not inconsistent with the statute and that it

furthered certain policy goals. In other words, the limitation on private suits under Section 10(b) was not found in the statute at all, it was added by courts to reduce the number of securities suits.

43. The Supreme Court emphasized that it had not found this limitation in the statute:

> we would by no means be understood as suggesting that we are able to divine from the language of § 10(b) the express 'intent of Congress' as to the contours of a private cause of action under Rule 10b-5. When we deal with private actions under Rule 10b-5, we deal with a judicial oak which has grown from little more than a legislative acorn. 421 U.S. at 737.

The Court therefore decided, since *it* was making the rule instead of interpreting what Congress had enacted, it could consider policy issues for itself – which it proceeded to do. Id. at 737-740 (discussing, inter alia, the "widespread recognition that litigation under Rule 10b-5 presents a danger of vexatiousness different in degree and in kind from that which accompanies litigation in general" and determining that limiting such litigation struck a useful balance, id. at 739).

44. The Court reiterated, after concluding that nothing in the statute prohibited it from adding a rule to limit private suits, that this was judge-made law, not statutory interpretation:

> We are dealing with a private cause of action which has been judicially found to exist, and which will have to be judicially delimited one way or another unless and until Congress addresses the question. Id. at 749.

45. Blue Chip Stamps shows that the Supreme Court found that Section 10(b)'s "in connection with" language was *not* limited to purchases or sales by plaintiffs. *That* was why the Court felt compelled to fashion its *own* rule: there was no such limitation in the statute.

46. This is further underscored by the concurrence. Justice Powell, joined by two others, wrote separately to note that they believed the limitation *could* be construed from the statute. Id. at 760. This was the position that *lost*. Unable to attract others to their minority view, they joined the majority. And the majority rule became controlling authority.

47. The Supreme Court continues to recognize that Blue Chip Stamps' limitation on private securities actions is *not* to be found in the "in connection with" language or anywhere else in Section 10(b) or Rule 10b-5. In Musick, Peeler & Garrett v. Employers Ins. of Wausau, 508 U.S. 286, 293, 295 (1993), for example, the Supreme Court reiterated that the limitation on private actions imposed by Blue Chip Stamps was judge-made law, not statutory interpretation. Musick built on this federal common law by fashioning a right of contribution. Id. at 297.

48. The Supreme Court's decisions since Blue Chip Stamps have also not found any such limitation in Section 10(b) itself. Rather, the Court has consistently held that purchases and sales by *anyone* satisfy Section 10(b) so long as they "coincide" with the misconduct. See, e.g., United States v. O'Hagan, 521 U.S. 642, 656 (1997) (finding Section 10(b)'s "in connection with" requirement satisfied because attorney O'Hagan's breach of duty to his firm's client coincided with his *own* purchases of securities, concluding: "The securities transaction and the breach of duty thus coincide."); accord SEC v. Zandford, 535 U.S. 813, 822 (2002) ("It is enough that the scheme to defraud and the sale of securities coincide."). In O'Hagan, the Supreme Court also made clear that the "in connection with" requirement was met, "even though the person or entity defrauded is not the other party to the trade." 521 U.S. at 656.

49. In Zandford, decided only two years ago, the Supreme Court emphasized that the statutory language "should be construed not technically and restrictively, but

flexibly to effectuate its remedial purpose." Id. at 819 (quotations omitted).

50. The Supreme Court has also found that misconduct satisfies the "in connection with" prong of Section 10(b) when the person engaged in the conduct did not purchase or sell securities himself, but instead participated in a scheme where others did the securities trading. See Carpenter, 484 U.S. at 23, 28 (ruling that Wall Street Journal columnist violated Section 10(b) and Rule 10b-5 by breaching his duty to his employer in enabling others to buy and sell securities at a profit). Noting that "the victim of the fraud, the Journal, was not a buyer or seller of the stocks traded in or otherwise a market participant, the fraud was nevertheless considered to be 'in connection with' a purchase or sale of securities within the meaning of the statute and the rule," the Court affirmed the convictions under the securities laws. Id. at 24.

51. The allegations plaintiff asserts satisfy SLUSA's "in connection with" requirement for the same reasons. Plaintiff alleges that Pacific Life, like the newspaper columnist in Carpenter, engaged in manipulative conduct, in breach of its fiduciary duty to its investors, as a co-participant in a scheme to enable market timers to advantageously purchase and sell securities, for their mutual profit. See, e.g., Complaint ¶¶ 53, 57, 62, 73-76.

52. There is no other provision of SLUSA that limits its scope to lawsuits brought solely by those who have been harmed in their purchase or sale of securities. Congress could easily have limited SLUSA's scope to match the limitation courts have imposed on private lawsuits under Section 10(b). It could have defined "covered class actions" to include only lawsuits brought by purchasers or sellers of securities. Congress could also have expressly preserved suits brought by non-purchasers and non-sellers under state law. Congress, however, did neither. See 15 U.S.C. §§ 77p(d), (f)(2)(A), 78bb(f)(3), (f)(5)(B).

53. Instead, Congress used language to define its pre-emptive scope – "in connection with the purchase or sale"

of securities – that has long been interpreted to include claims like those alleged by plaintiff. No additional restriction can be implied from SLUSA's purpose to prevent plaintiffs from making an end-run around the procedural rules governing federal securities lawsuits for two reasons. First, the statutory language provides otherwise and there is no language from which a restriction could be implied. Second, such an implication would be entirely contrary to Congress' broader purpose in enacting SLUSA.

54. Congress enacted SLUSA to protect participants in the securities market from the class action lawsuits it had concluded were doing more harm than good for investors and the economy. See, e.g., S. Rep. 105-182 at 4 (1998) ("state-court class actions involving nationally traded securities" have "damaged the overall efficiency of our capital markets"), at 5 ("We do have national markets for certain securities, and fraudulent and abusive securities class action litigation distorts the efficient operation of those markets and the optimal allocation of available capital."), id. (explaining that SLUSA was necessary because, otherwise, "a single state can impose the risks and costs of its peculiar litigation system on all national issuers").

55. Congress had long accepted the courts' elimination of *federal* lawsuits by non-purchaser/seller plaintiffs and was engaged in limiting even permitted lawsuits because it had determined that even *they* were harmful to the economy. No purpose can be implied to preserve additional *state* law suits imposing the *same* harms, when Congress did not do so expressly. SLUSA, like Blue Chip Stamps, was aimed at reducing such harms. Thus, the policy concerns on which Blue Chip Stamps relied support this Court's according SLUSA its full, broad scope.

56. This lawsuit also meets the remaining criteria for removal under SLUSA. The lawsuit is a "covered class action," because damages are sought on behalf of prospective class members. Complaint ¶¶ 38-48; see 15 U.S.C.

§§ 77p(f)(2)(A)(i)(II) and 78bb(f)(5)(B). It purports to be based on state law because it asserts only state law claims. Complaint ¶¶ 53, 57, 62, 67; see 15 U.S.C. §§ 77p(b), 78bb(f)(1). It involves a "covered security," as defined by Sections 77p(f)(3) and 78bb(f)(5)(E), because the variable annuity Separate Account, with its subaccount holdings in mutual fund portfolios, is an investment product within the meaning of the statute and registered with the SEC. See Herndon v. Equitable Variable Life Ins. Co., 325 F.3d 1252 (11th Cir. 2003); Patenaude v. Equitable Live Assurance Soc'y, 290 F.3d 1020, 1024 (9th Cir. 2002); Lander v. Hartford Life & Annuity Ins. Co., 251 F.3d 101, 108-14 (2d Cir. 2001).

57. In addition, claims "based upon Pacific Life's conduct in connection with Plaintiff's or any class member's" purchases triggered by automatic reinvestment of dividends and capital gains also fall within SLUSA, but are not excluded in the complaint. Plaintiff's express exclusion of claims in connection with plaintiff's or class member's purchases is limited to purchases of "any Pacific Life annuity product or units in any Pacific Life sub-account." Complaint ¶ 40. Automatic reinvestments were not distributed to class members as subaccount units, but as increases in the value of their subaccount units – but this increased value reflects, as do subaccount units, their beneficial ownership of shares of the mutual fund portfolios.

B. Diversity Jurisdiction

58. This Court also has jurisdiction under 28 U.S.C. § 1332 because this is a civil action between citizens of different states in which the matter in controversy exceeds $75,000.

59. There is complete diversity within the meaning of 28 U.S.C. § 1332. Plaintiff is a citizen of Illinois. Pacific Life is a citizen of California. Complaint ¶¶ 1, 3.

60. The amount in controversy exceeds $75,000 within the meaning of 28 U.S.C. § 1332 for two independent reasons. First, plaintiff seeks injunctive relief under Count

IV of a value far in excess of the jurisdictional amount. Complaint pp. 15-16. Plaintiff deceptively does not specify injunctive relief by name, but asks for it under the guise of "any other relief the Court deems appropriate under the circumstances in accordance with Section 17200." Id. at 16. Inclusion of the phrase in Count IV was specific and deliberate. Plaintiff did not include a prayer for "any other relief the Court deems appropriate" under Counts I, II, or III of the complaint. He included this request only in Count IV, his claims under Cal. Bus. & Prof. § 17200.

61. The only relief available under Section 17200 is restitution or injunctive relief. See §§ 17202, 17203; Cort v. St. Paul Fire & Marine Ins. Companies, 311 F.3d 979, 987 (9th Cir. 2002) ("Section 17200 . . . entitles an individual litigant only to injunctive and restitutionary relief"). Because plaintiff expressly asked for restitution separately, the request for "any other relief" under Section 17200 can be understood only as a stealth request for injunctive relief.

62. Courts within the Seventh Circuit consider the potential cost of such injunctive relief to Pacific Life in determining the amount in controversy because the Seventh Circuit, like many others, follows the "either viewpoint" rule. See In re Brand Name Prescription Drugs Antitrust Litig., 123 F.3d 599, 609 (7th Cir. 1997); BEM I, LLC v. Anthropologie, Inc., 301 F.3d 548, 553 (7th Cir. 2002) (courts consider "the amount at stake to either party to the suit").

63. Furthermore, the Seventh Circuit rule requires courts to look "separately at each named plaintiff's claim and the cost to the defendant of complying with an injunction directed to that plaintiff." Uhl v. Thoroughbred Tech. and Telecomm, Inc., 309 F.3d 978, 983 (7th Cir. 2002). Thus, the amount in controversy is the cost to Pacific Life of compliance.

64. The cost of compliance, and therefore the amount at stake to Pacific Life, far exceeds $75,000. Plaintiff's request for any injunctive relief the court deems appro-

priate encompasses trading rule changes and the notification requirements that would be triggered by them. The cost of even one such change would far exceed $75,000. See Griggs Decl. ¶ 9.

65. A second basis for diversity jurisdiction is that the injury plaintiff alleges is derivative, not direct, and plaintiff clearly expects the amount that would be due the mutual fund portfolios if the allegations prove true, to exceed $75,000 – given plaintiff's estimate as "not more than $75,000" for *each* plaintiff and class member for a putative class of many thousands.

66. The Second Circuit's decision in Strougo v. Bassini, 282 F.3d 162 (2d Cir. 2002), does not counsel otherwise for two reasons. First, Strougo applied Maryland law; Massachusetts law applies here because the Pacific Select Fund is organized under Massachusetts law. See Kamen v. Kemper Fin. Serv., Inc., 500 U.S. 90, 97, 109 (1991). Under Massachusetts law, the fiduciary duty of proper management is owed to the fund, not to investors. See Bessette v. Bessette, 385 Mass. 806, 809, 434 N.E.2d 206, 208 (Mass. 1982). Investors who are injured in the form of a loss in investment value can bring only derivative claims. Blasberg v. Oxbow Power Corp., 934 F. Supp. 21, 26 (D. Mass. 1996); see also Green v. Nuveen Advisory Corp., 186 F.R.D. 486, 490 (N.D. Ill. 1999) (applying Massachusetts law) (diminution in value of shares is an injury to the funds, and any harm to shareholders is derivative in nature).

67. Here, plaintiff alleges that Pacific Life's improper management permitted market timers to reduce the net asset values of mutual fund portfolios which caused his investment to lose value. The claimed damages flow from the allegedly diminished value of mutual fund portfolios, in proportion to each class member's interests in that portfolio. Under Massachusetts law, plaintiff only has a derivative claim. He does not allege he was injured by being misled into purchasing his investment, which would be a direct claim. See Blasberg, 934 F. Supp. at 26.

Rather he expressly excludes such claims. Complaint ¶ 40.

68. Second, in Strougo, unlike here, the fund itself had no claim because it was not injured, so the shareholders could not have brought a derivative action on the fund's behalf. The fund did not suffer any diminution of value but, in fact, increased in value as a result of the challenged conduct. Id. at 175. Thus, Strougo found that the plaintiff had an injury "distinct" from the fund, because the fund did not suffer any injury and the reduction in plaintiff's equity did not derive from a reduction in the value of the Fund's assets. Id. See Rohrbaugh v. Investment Co. Inst., Fed. Sec. L. Rep. ¶ 91,961, 2002 WL 31100821, *7 (D.D.C. 2002) (finding Strougo inapplicable where plaintiffs' injuries derived from the diminution of the value of mutual funds they held because in Strougo "the act that allegedly harmed the shareholders actually increased the assets of the fund").

69. In contrast, Spurgeon alleges that the funds *have* been diminished by Pacific Life's alleged mismanagement. Unlike the allegations in Strougo, Spurgeon's allegations set forth potential claims that the Pacific Select Fund itself could bring against Pacific Life. And Spurgeon's alleged damages are entirely indirect, flowing from the alleged diminution of the funds' assets, in proportion to his claimed share. Spurgeon's claims, therefore, are entirely derivative of the Fund's claims and can only be brought on behalf of the Fund. See Rohrbaugh, 2002 WL 31100821 at *7 (applying Massachusetts law in ruling that the injury alleged was not distinct from that suffered by the funds and was therefore derivative).

V. VENUE AND NOTICE

70. Venue is proper under 28 U.S.C. § 1441(a) because the action has been pending in this district and division. Defendant has filed a copy of this Notice of Removal with the Clerk of the Circuit Court of the Third Judicial Circuit, Madison County, Illinois, in which the action has

been pending, and will serve such notice upon all adverse parties.

Dated: May 21, 2004

[attorney name and address blocks omitted]

Supreme Court U.S.
FILED
MAR 28 2006
OFFICE OF THE CLERK

No. 05–409

In the Supreme Court of the United States

CARL KIRCHER, ET AL.

Petitioner,

v.

PUTNAM TRUST FUNDS, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether the court of appeals had jurisdiction to review the district court's holding that petitioners' state-law claims are not precluded by the Securities Litigation Uniform Standards Act of 1998.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

INTEREST OF THE AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. SLUSA AUTHORIZES APPEALS FROM DISTRICT COURT ORDERS REJECTING SLUSA PREEMPTION 4

A. The Language Of SLUSA Distinguishes Between Removability And Preemption 5

B. The Unambiguous Policy Of SLUSA Confirms That Securities Class Actions Belong In Federal Court 8

1. SLUSA Was Intended To Establish Uniform Standards To Govern Securities Class Action Litigation, Thus Discouraging Abusive Lawsuits 8

2. Petitioners' Cramped Reading Of SLUSA's Removal Provision Would Frustrate The Statutory Goals 13

II. THE BAR ON APPELLATE REVIEW OF REMANDS DOES NOT EXTEND TO CIRCUMSTANCES IN WHICH THE MERITS AND JURISDICTIONAL INQUIRIES ARE IDENTICAL 23

CONCLUSION 27

TABLE OF AUTHORITIES

Page(s)

CASES

Abela v. *General Motors Corp.*,
677 N.W.2d 325 (Mich. 2004) 17

Adams v. *Pacific Bell Directory*,
111 Cal. App. 4th 93 (2003) 14

Adkins v. *Ill. Cent. R.R. Co.*,
326 F.3d 828 (7th Cir. 2003) 24

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983 F.2d 1341 (6th Cir. 1993) 16

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421 U.S. 723 (1975) 8, 20

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891 So. 2d 310 (Ala. 2004) 16

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337 U.S. 541 (1949) 26

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437 U.S. 463 (1978) 26

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94 P.3d 830 (N.M. Ct. App. 2004) 15

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463 U.S. 646 (1983) 11

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57 F.3d 350 (3d Cir. 1995) 17

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Page(s)

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527 U.S. 423 (1999) 7

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158 F.3d 1143 (11th Cir. 1998) 16

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877 P.2d 11 (Kan. Ct. App. 1994) 16

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Dabit, 547 U.S. ___ (2006) ..... *passim*

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481 U.S. 58 (1987) 17

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Constr. Corp., 460 U.S. 1 (1983) 26

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4 F.3d 319 (4th Cir. 1993) 16

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759 A.2d 217 (Me. 2000) 15

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395 U.S. 402 (1969) 2, 5, 7

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1995, Pub. L. No. 104–67, 109 Stat. 737 3

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INTEREST OF THE *AMICUS CURIAE*

The Chamber of Commerce of the United States of America is the world's largest business federation, representing a membership of more than three million businesses and organizations of every size, in every industry sector and geographical region of the country.[1] A central function of the Chamber is to represent the interests of its members in important matters before the courts, Congress, and the Executive Branch. To that end, the Chamber has filed *amicus* briefs in numerous cases addressing issues of vital concern to the Nation's business community. The Chamber filed a brief in *Merrill, Lynch, Pierce, Fenner & Smith, Inc.* v. *Dabit*, 547 U.S. ___ (2005), which, like this case, involved the meaning of the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"), Pub. L. No. 105–353, 112 Stat. 3227 (codified as amended in various sections of 15 U.S.C.).

The Chamber has a substantial interest in the issue presented in this case: the appealability of a federal district court's determination that a securities class action arising under state law is not preempted by SLUSA. Securities class action litigation imposes an enormous toll on the national economy, affecting virtually every public corporation in America and costing American businesses billions of dollars in settlements every year. Indeed, a recent study concluded that, over a five-year period, the average public corporation has a 10% probability of facing at least one securities class-action lawsuit. Buckberg *et al.*, NERA, *Recent Trends in*

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[1] Pursuant to Rule 37.6 of the Rules of this Court, *amicus* states that this brief was not authored in whole or in part by counsel for a party and that no person or entity, other than the *amicus curiae*, its members, and its counsel made a monetary contribution to its preparation and submission. The written consents of the parties to the filing of this brief have been filed with the Clerk of the Court.

Securities Class Action Litigation: Are WorldCom and Enron the New Standard? 2 (July 2005).

Congress has enacted legislation to rein in some of the worst abuses of securities class-action litigation, assuring that class actions involving nationally traded securities are governed by federal standards and may be heard in federal court. Petitioners' argument in this case — which contends that appellate review is unavailable when a federal district court remands a removed securities class action to state court — departs from the language of the SLUSA and would frustrate the realization of Congress's goal to reform securities litigation. The Chamber believes that the experience of its members with abusive class action litigation makes it well situated to address the issues presented here.

SUMMARY OF ARGUMENT

1. Petitioners' argument rests on a misreading of SLUSA's removal provision. Petitioners contend that, where removal to federal court of a state-law claim asserted to be preempted by SLUSA is concerned, the merits and jurisdictional inquiries are identical. On this reading of the removal provision, a district court has jurisdiction to entertain the removed action only if it first resolves the merits of the suit by determining that plaintiffs' claims are in fact preempted, at which point the case must promptly be dismissed — an approach to removal that the Court, in a related setting, has labeled "anomalous." *Willingham* v. *Morgan*, 395 U.S. 402, 407 (1969).

That approach is not a plausible construction of the SLUSA removal provision. Instead, SLUSA is most naturally read as providing that removal is proper when the defendant asserts a *colorable* argument that the requirements for preemption are satisfied. That understanding follows from the statutory language, which separately treats removability and preemption. Indeed, the Court seemed to read the

removal provision just that way in *Dabit*, where it noted that the statute "makes all 'covered class actions' filed in state court removable." Slip op. 10 n.7. Under this reading of SLUSA, removal here plainly was proper; appellate review of the district court's rejection of respondents' preemption defense therefore follows as a matter of course.

2. The statutory background and policy confirm that district court decisions rejecting a SLUSA preemption defense are not insulated from appellate review. SLUSA is a part of Congress's comprehensive effort, begun with enactment of the Private Securities Litigation Reform Act of 1995 ("PSLRA"), Pub. L. No. 104–67, 109 Stat. 737 (codified as amended at 15 U.S.C. § 77a *et seq.*), to curb abusive securities litigation. The PSLRA broadly reformed the process of federal securities litigation, establishing various safeguards against meritless strike suits. When plaintiffs sought to circumvent the PSLRA by bringing securities-fraud class actions under state law in state court, Congress responded by enacting SLUSA, which assures that securities class action litigation is governed by uniform national standards. SLUSA's removal provision, which makes it possible for federal courts to determine whether state-law securities class actions are precluded by SLUSA's substantive provisions, is a "key" element of the statute. *Dabit*, slip op. 10 n.7.

Against this background, petitioners' approach — which precludes appellate review of a district court's decision rejecting a SLUSA preemption defense in any case that has been removed from state to federal court — would substantially undermine the congressional goals. Under petitioners' reading, it is likely that defendants will never be able to test on appeal in *any* court their contention that particular state-law securities claims are preempted by federal law. This would make it impossible to achieve uniformity in the law. That, in turn, would encourage forum shopping by plaintiffs, inevitably would lead to the survival of abusive lawsuits, and

therefore would foment the very harms that Congress sought to prevent when it enacted the PSLRA and SLUSA.

3. Even if petitioners' reading of SLUSA is correct, their understanding of 28 U.S.C. § 1447(d) is not. That provision must be construed together with Section 1447(c) and in light of its purposes. Those purposes are undisputed: by barring appeal of a district court's decision to remand a case to state court, Section 1447(d) seeks to prevent interruption of litigation regarding the merits of a lawsuit by protracted disputes about peripheral jurisdictional or procedural matters. That policy, however, has no application in this case. Here, the jurisdictional issue (on petitioners' view of the case) is *not* distinct from the merits; to the contrary, petitioners submit that determination of jurisdiction requires *resolution* of the merits of the principal defense to liability. In such circumstances, the rationale for precluding appeal of remand orders — avoiding delay in adjudication of the merits — is wholly inapplicable.

ARGUMENT

I. SLUSA AUTHORIZES APPEALS FROM DISTRICT COURT ORDERS REJECTING SLUSA PREEMPTION

There is no doubt about the goal of SLUSA: Congress sought to implement uniform national standards governing securities class action litigation, while preventing the use of state-law securities claims to circumvent the federal-law reforms enacted by the PSLRA. See *Dabit*, slip op. at 9–10. It is manifest, however, that petitioners' contention in this case — which would preclude appellate review of district court decisions rejecting the preemption defense created by SLUSA — would frustrate those goals. In this case, as in *Dabit*, a "broad construction" of the relevant provision of SLUSA "follows not only from ordinary principles of statutory construction but also from the particular concerns that

culminated in SLUSA's enactment. A narrow reading of the statute would undercut the effectiveness of the 1995 Reform Act and thus run contrary to SLUSA's stated purpose, viz., 'to prevent certain State private securities class action lawsuits alleging fraud from being used to frustrate the objectives' of the 1995 Act." Slip op. 13–14 (quoting SLUSA § 2(5), 112 Stat. 3227). Petitioners' approach accordingly should be rejected and the decision below affirmed.

A. The Language Of SLUSA Distinguishes Between Removability And Preemption

At the outset, petitioners' argument rests on a misreading of SLUSA's removal provision. Petitioners' central argument is that, where SLUSA preemption is concerned, the merits and jurisdictional inquiries in a removed case are *identical*; on this reading of the removal provision, the district court has jurisdiction to entertain the removed action only if it first resolves the merits of the suit by determining that the plaintiffs' claim is in fact preempted by federal law. Petitioners thus understand SLUSA to dictate, as the Court put it when addressing a very similar argument regarding another removal provision, "the anomalous result of allowing removal only when the [defendants] had a sustainable defense." *Willingham* v. *Morgan*, 395 U.S. 402, 407 (1969). But this peculiar and counter-intuitive approach does not follow from the statutory text.

SLUSA's removal provision states that

> *[a]ny* covered class action brought in any State court *involving* a covered security, as set forth in subsection (b) of this section, shall be removable to the Federal district court for the district in which the action is pending, and shall be subject to subsection (b).

15 U.S.C. §§ 77p(c), 78bb(f)(2) (emphasis added). Respondents persuasively show that this language does not require

satisfaction of all of the requirements for preemption before removal is appropriate, and we will not repeat that argument in detail. It bears emphasis, though, that the statute is most naturally read as providing that removal is proper whenever the defendant asserts a *colorable* argument that the requirements for preemption are satisfied. That understanding follows from the removal provision's broad directive that federal courts may entertain "any" class action "involving" a covered security, as well as its separate treatment of removability (a class action "shall be removable") and preemption (removed case "shall be subject to subsection (b)"). Indeed, the Court recently seemed to read the provision in just that way in *Dabit*. There, the Court described SLUSA's removal language as a "key provision of the statute [that] makes all 'covered class actions' filed in state court removable to federal court" (slip op. 10 n.7); the Court did not suggest that a class action is removable only if the district court first determines that preemption is required by 15 U.S.C. § 77p(b), the SLUSA preclusion provision.

This reading of SLUSA also accords with the Court's approach to analogous removal provisions. The statute permitting federal officer removal, for example, authorizes removal to federal court of a suit against a federal officer if the action is for "any act under color of such office." 28 U.S.C. § 1442(a)(1). The Court has not read that statute to provide for removal only if the district court first determines definitively that the defendant *in fact* was acting under color of federal office, as petitioners' approach here would seem to dictate. Instead, the Court has held the language to be

> [b]road enough to cover all cases where federal officers can raise a *colorable* defense arising out of their duty to enforce federal law. One of the primary purposes of the removal statute — as its history clearly demonstrates — was to have such defenses litigated in the federal courts. [Petitioners']

> position * * * would have the anomalous result of allowing removal only when the officers had a clearly sustainable defense. The suit would be removed only to be dismissed. Congress clearly meant more than this * * * . The officer need not win his case before he can have it removed. In cases like this one, Congress has decided that federal officers * * * require the protection of a federal forum. This policy should not be frustrated by a narrow, grudging interpretation of § 1442(a)(1).

Willingham, 395 U.S. at 407 (emphasis added). See also *Jefferson County* v. *Acker*, 527 U.S. 423, 431–432 (1999).

The same considerations apply here. The language of Section 1447(d) likewise is "[b]road enough to cover all cases where [class action defendants] can raise a colorable defense" of SLUSA preemption. By the same token, enactment of the SLUSA removal provision itself shows that, "[i]n cases like this one, Congress has decided that [class action defendants] * * * require the protection of a federal forum." Because the preemption defense here surely is more than colorable — as the holding in *Dabit* establishes beyond dispute — removal accordingly was proper. That being so, the district court's rejection of the preemption defense cannot be thought to have retroactively divested that court of jurisdiction to entertain the suit. Appellate review of the district court's preemption decision therefore is warranted as a matter of course.[2]

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[2] For reasons explained by respondents (at Br. 12–16), an otherwise appealable decision cannot be insulated from review simply because the district court purports to base its remand on lack of jurisdiction. In *Thermtron Prods., Inc.* v. *Hermansdorfer*, 423 U.S. 336 (1976), for example, mandamus surely would not have become unavailable had the district court asserted that it lacked jurisdiction to decide the case because its docket was crowded.

B. The Unambiguous Policy Of SLUSA Confirms That Securities Class Actions Belong In Federal Court

Petitioners' reading of SLUSA accordingly misunderstands the statutory language. But to the extent that there is any doubt on that score, the statutory background and policy confirm that SLUSA should not be read to insulate district court decisions that reject a preemption defense from appellate review. The SLUSA was designed to establish uniform national standards governing securities litigation, while discouraging abusive securities class actions. Petitioners' reading of the SLUSA removal provision would undermine both of those goals, and thus would frustrate the paramount "federal interest in protecting the integrity and efficiency of the market for nationally traded securities." *Dabit*, slip op. 5. As a consequence, respondents' reading of SLUSA is the one that "more accurately reflects the intention of Congress, is more consistent with the structure of the Act, and more fully serves the purposes of the statute." *FBI* v. *Abramson*, 456 U.S. 615, 624–625 (1982).

1. SLUSA Was Intended To Establish Uniform Federal Standards To Govern Securities Class Action Litigation, Thus Discouraging Abusive Lawsuits

a. To appreciate the extent to which petitioners would depart from the congressional intent, it is useful to begin with a consideration of the underlying problem that Congress sought to address when it enacted SLUSA: Congress was concerned that securities class action litigation fostered abusive lawsuits, with destructive consequences for the national economy. As this Court has recognized, securities-fraud litigation presents "a danger of vexatiousness different in degree and in kind from that which accompanies litigation in general" (*Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 739 (1975)) because such suits contain unique elements

that encourage defendants to settle even insubstantial claims — and that, as a consequence, encourage plaintiffs to file them. See generally Coffee, *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669 (1986).

The direct costs of securities litigation impose enormous burdens on defendants,[3] while the sheer size of the damages demanded in national class actions makes it attractive for defendants to forgo the adversarial process and settle even meritless suits to avoid the prospect of ruinous liability. See H.R. Conf. Rep. No. 104–369, at 37–38 (1995); S. Rep. No. 104–98, at 5, 9 (1995). That is so regardless of the strength of the plaintiffs' claims; the costs and risks of litigation make the merits of securities suits largely irrelevant to the decision to settle. Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 STAN. L. REV. 497, 516–517 (1991).[4]

These insubstantial strike suits are of little benefit to shareholders. In addition to the significant transaction costs

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[3] See, *e.g.*, Kassis, *The Private Securities Litigation Reform Act of 1995: A Review of Its Key Provisions and an Assessment of Its Effects at the Close of 2001*, 26 SETON HALL LEGIS. J. 119, 124 (2001) (describing the discovery process as "financial blood letting"); see also Pritchard, *Markets as Monitors: A Proposal to Replace Class Actions with Exchanges as Securities Fraud Enforcers*, 85 VA. L. REV. 925, 953 (1999) (lost productivity may "dwarf the expense of attorneys' fees"); S. Rep. No. 104–98, at 14 (1995).

[4] See also Garry *et al.*, *The Irrationality of Shareholder Class Action Lawsuits: A Proposal for Reform*, 49 S.D. L. REV. 275, 287 n.98 (2005); Bohn & Choi, *Fraud in the New-Issues Market: Empirical Evidence on Securities Class Actions*, 144 U. PA. L. REV. 903, 979–980 (1996).

such suits entail, to the extent that class members still own shares in the issuer, "payments by the corporation to settle a class action amount to transferring money from one pocket to the other, with about half of it dropping on the floor for lawyers to pick up." Alexander, *Rethinking Damages in Securities Class Actions*, 48 STAN. L. REV. 1487, 1503 (1996); see also Coffee, *Causation by Presumption? Why the Supreme Court Should Reject Phantom Losses and Reverse* Broudo, 60 BUS. LAW. 533, 542–543 (2005); Perino, *Did the Private Securities Litigation Reform Act Work?*, 2003 U. ILL. L. REV. 913, 921–922; Easterbrook & Fischel, *Optimal Damages in Securities Cases*, 52 U. CHI. L. REV. 611, 638–639 (1985). At the same time, the costs of abusive litigation are felt throughout the national economy. These costs are borne disproportionately by the most innovative and entrepreneurial companies, which are targeted because the volatility of their share price attracts the attention of the plaintiffs' bar[5]; the risk of liability deters competent individuals from serving as independent directors on corporate boards (see S. Rep. No. 104–98, at 21); accounting firms, often named as deep-pocket defendants, become less willing to perform auditing services (see *id.* at 21–22); and D&O insurers must increase premiums or stop underwriting policies altogether. See *id.* at 21.

Furthermore, because any statement by an issuer that later is proven inaccurate or any prediction that fails to come true could form the predicate for an allegation of fraud, the prospect of liability chills corporate disclosures of informa-

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[5] See *Securities Litigation Reform Proposals: Hearings on S. 240, S. 667, and H.R. 1058 Before the Subcomm. on Securities of the S. Comm. on Banking, Housing, and Urban Affairs*, 104th Cong., 1st Sess. 109 (1995) (testimony of George Sollman on behalf of the American Electronics Association) (estimating that about half of the top 100 companies in Silicon Valley have been subjected to a securities class action lawsuit at least once).

tion that could be useful to investors, thus directly frustrating the disclosure objectives of the federal securities laws. See *id.* at 15–16; Easterbrook & Fischel, THE ECONOMIC STRUCTURE OF CORPORATE LAW 339 (1991) (noting that because a firm that discloses information "inevitably takes the risk of excessive optimism and excessive pessimism," a "rule penalizing excesses in either direction would lead to silence" about a company's prospects). The risk of liability also muzzles corporate managers' communications with analysts, which are "necessary to the preservation of a healthy market." *Dirks* v. *SEC*, 463 U.S. 646, 658–659 (1983); see also SEC, Release No. 33–7881, 65 Fed. Reg. 51716, 51718 n.19 (2000) ("fear of legal liability" "chill[s]" communications with analysts). And when SEC disclosure requirements do not make silence an option, issuers may respond to the threat of unconstrained liability with defensive disclosures that "bury the shareholders in an avalanche of trivial information." *TSC Indus.* v. *Northway, Inc.*, 426 U.S. 438, 448–449 (1976).[6]

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[6] In addition to detracting from the quantity and quality of information received by investors, securities class-action abuse reduces the overall competitiveness of United States securities markets, as fear of potential liability deters foreign companies from listing on domestic stock exchanges. *Common Sense Legal Reform Act: Hearings on H.R. 10 Before the Subcomm. on Telecommunications and Finance of the H. Comm. on Commerce*, 104th Cong., 1st Sess. 221, 224 (1995) (statement of former SEC Chairman Richard C. Breeden) ("Based on conversations with potential issuers of securities all over the world, the fear of litigation inhibits foreign firms from participating in the U.S. market[s]."); see also PricewaterhouseCoopers LLP, *2004 Securities Litigation Study* 2 (Mar. 2005), available at http://www.10b5.com/2004_study.pdf (reporting that a record 29 foreign issuers were sued in domestic securities class actions in the 2004 fiscal year).

b. In the face of these abuses, Congress acted to broadly reform the process of securities litigation. This movement began with enactment of the PSLRA in 1995. That statute took far-ranging steps to rein in meritless litigation and increase issuers' incentives to disclose information to investors. The PSLRA's reforms included creation of a "safe harbor" for certain "forward-looking statements" by issuers, restrictions on the selection of lead class action plaintiffs in securities-fraud suits, sanctions for frivolous litigation, a stay of discovery pending resolution of motions to dismiss, and heightened pleading standards. See *Dabit*, slip op. 9.

As the Court recognized in *Dabit*, however, plaintiffs responded to enactment of the PSLRA by bringing securities-fraud class actions in state court under state law. See *Dabit*, slip op. 9–10. Prior to the enactment of the PSLRA, state securities laws — the subject of SLUSA — played virtually no role in class-action litigation involving securities traded on national exchanges. But that changed as plaintiffs and their attorneys attempted to circumvent the PSLRA's reforms. The plaintiffs' bar had brought "essentially no significant securities class action litigation" in state courts before the effective date of the PSLRA. H.R. Rep. No. 105–640, at 10 (1998). In the two years after the enactment of the PSLRA, however, at least 104 state-law securities class actions were filed. Rosen, *The Statutory Safe Harbor for Forward-Looking Statements After Two and a Half Years: Has It Changed the Law? Has It Achieved What Congress Intended?*, 76 WASH. U. L.Q. 645, 670 (1998). Predictably, the weaker cases, which would not have survived in federal court after enactment of the PSLRA, were the ones filed in state court. See Perino, *Fraud and Federalism: Preempting Private State Securities Fraud Causes of Action*, 50 STAN. L. REV. 273, 307–318 (1998); SEC. Office of General Counsel, *Report to the President and the Congress on the First Year of Practice Under the Private Securities Litigation Reform Act of 1995*, Apr. 1997, at 84 (noting that increase in filings of

state securities class actions "may reflect a migration of weaker cases to state court"). The obvious effect of the movement of securities class actions to state court was to frustrate the PSLRA's purposes and to resurrect the abusive practices that Congress had sought to discourage.

In this context, there is no mystery about Congress's goal in enacting SLUSA: that Act's preemption of state law and attendant removal provision were intended to "stem this 'shif[t] from Federal to State courts' and 'prevent certain State private securities class action lawsuits alleging fraud from being used to frustrate the objectives of' the Reform Act." *Dabit*, slip op. 10 (citation omitted). Representative Bliley, the House Manager of SLUSA, remarked that "[t]he premise of this legislation is simple: *lawsuits alleging violations that involve securities that are offered nationally belong in Federal court.*" 144 Cong. Rec. H10771 (daily ed. Oct. 13, 1998) (emphasis added); see also H.R. Conf. Rep. No. 105–803, at 13 (1998) ("[The SLUSA] makes Federal court the exclusive venue for most securities class action lawsuits.").

2. *Petitioners' Cramped Reading Of SLUSA's Removal Provision Would Frustrate The Statutory Goals*

Against this background, it is manifest that petitioners' approach — which reads the SLUSA removal provision to require an immediate remand to state court when the district court finds that the plaintiffs' claims are not preempted — would substantially undermine the congressional goals. That approach would make it difficult (and sometimes impossible) to achieve uniformity in the rules governing nationally traded securities. It would encourage forum-shopping by securities fraud class-action plaintiffs, who typically have their choice of venue. It would foster continuation of the abusive practices that Congress sought to prevent. And it would, as a consequence, have the pernicious effects on the securities

markets and the broader national economy that prompted enactment of the PSLRA and the SLUSA. Petitioners' approach accordingly should be rejected.

a. To begin with, if remand orders under SLUSA may not be appealed, there is a substantial prospect that defendants *never* will be able to test on appeal in *any* court their contention that particular state-law securities claims are preempted by federal law. Petitioners assert that a remand under SLUSA necessarily must be premised on the district court's determination that the plaintiff's claim is not preempted. If that is so, state courts likely will conclude on remand that preclusion doctrines such as the law of the case or collateral estoppel bar defendants from relitigating the question whether the state-law claims at issue fall within the preemptive scope of 15 U.S.C. § 77p(b).

Indeed, this Court has suggested that state courts may accord collateral estoppel effect to federal district court determinations made in the course of remands for lack of subject-matter jurisdiction. In *Ruhrgas AG* v. *Marathon Oil Co.*, 526 U.S. 574, 586 (1999), the Court hypothesized a federal district court remanding a breach-of-contract action for lack of the requisite amount in controversy to support diversity jurisdiction on the ground that the district court believed state law to bar punitive damages in such cases. The Court remarked that the holding as to the unavailability of punitive damages "will travel back with the case. Assuming a fair airing of the issue in federal court, that court's ruling on permissible state-law damages may bind the parties in state court, although it will set no precedent otherwise governing state-court adjudications." *Ibid.*

Unsurprisingly, many state courts have accepted this Court's suggestion, ruling that law-of-the-case or estoppel doctrines foreclose relitigation of defenses necessarily rejected by the federal district court in the course of determining that removal was improper. For example, in *Adams* v.

Pacific Bell Directory, 111 Cal. App. 4th 93 (2003), the defendant removed the case, persuading the district court that the state-law claims against it were preempted and that the preemption defense involved a federal question that supported federal question jurisdiction. After the court of appeals reversed that ruling and ordered the case remanded for lack of a federal question, the state court held that the defendant was barred under "the principles of the law of the case" from renewing its preemption defense in state court. *Id.* at 97–99.[7]

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[7] See also *Harris* v. *Ladner*, 828 A.2d 203, 205 (D.C. 2003) ("Whether or not the [federal] district court's rulings were 'law of the case,'" not an abuse of discretion to refuse to reconsider them following remand because "upon remand of a removed case, * * * the receiving court treats the pretrial orders of the [district] court as if they were its own."); *In re Wage Payments Litig.*, 759 A.2d 217, 225 (Me. 2000) (holding that state court bound by decision of federal district court prior to remand); *Cordova* v. *Larsen*, 94 P.3d 830, 835 (N.M. Ct. App. 2004) (declining to adopt a "per se rule affording no preclusive effect to a remanding federal court's orders"); *Hinterlong* v. *Baldwin*, 720 N.E.2d 315, 323 (Ill. Ct. App. 1999) ("[D]ecisions of the lower federal courts are not binding on state courts, except insofar as the decision may become the law of the case * * *.") (citations omitted); accord *Underwriters Nat'l Assurance Co.* v. *North Carolina Life & Accident & Health Ins. Guar. Ass'n*, 455 U.S. 691, 706–707 & n.13 (1982) ("'principles of *res judicata* apply to questions of jurisdiction'"); *Oglala Sioux Tribe of Pine Ridge Indian Reservation* v. *Homestead Mining Co.*, 722 F.2d 1407, 1412 (8th Cir. 1983) (jurisdictional dismissal precludes relitigation of statute's constitutionality); *Segal* v. *AT&T Co.*, 606 F.2d 842, 844–845 (9th Cir. 1979) (jurisdictional dismissal forecloses revisiting issues decided); *Roth* v. *McAllister Bros., Inc.*, 316 F.2d 143, 145 (2d Cir. 1963) (estopping defendant from denying that plaintiff was a seaman, the basis for a prior jurisdictional dismissal); see generally 18A Wright, Miller & Cooper, FEDERAL PRACTICE AND PROCEDURE § 4436, at 340 (3d ed. 1998) ("Although a dismissal for lack of jurisdiction does not bar a

To be sure, some federal courts of appeals addressing preemption under ERISA have indicated that a district court's rejection of the argument that state-law claims are "completely preempted" — and thus its holding that the complete preemption doctrine does not raise a federal question authorizing removal — does not preclude defendants from renewing their preemption defenses in state court. See, *e.g.*, *In re Loudermilch*, 158 F.3d 1143, 1146 (11th Cir. 1998); *Nutter* v. *Monongahela Power Co.*, 4 F.3d 319, 321–322 (4th Cir. 1993); *Baldridge* v. *Kentucky-Ohio Transp., Inc.*, 983 F.2d 1341, 1347–1350 (6th Cir. 1993). Two state court decisions have embraced this view specifically with respect to SLUSA. See *BT Secs. Corp.* v. *W.R. Huff Asset Mgmt. Co.*, 891 So. 2d 310, 316 & n.1 (Ala. 2004) (citing *Loudermilch*, *supra*, for proposition that state court not "bound" by remanding court's resolution of preemption under the SLUSA); *Shaw* v. *Charles Schwab & Co.*, 2003 WL 1463842, at *2 (Cal. Super. Ct. Mar. 7, 2003) (concluding that district court's rejection of preemption under the SLUSA was not "res judicata" on relitigation of defense in state court).

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second action as a matter of claim preclusion, it does preclude relitigation of those issues determined in ruling on the jurisdiction question."); Edney, Comment, *Preclusive Abstention: Issue Preclusion and Jurisdictional Dismissals After* Ruhrgas, 68 U. CHI. L. REV. 193, 197 (2001) ("[A] jurisdictional dismissal can be the basis for issue preclusion in that other court. In general, a jurisdictional dismissal precludes relitigation of the 'precise issue of the jurisdiction' of the dismissing court."). But see, *e.g.*, *McIntosh* v. *Atchison, Topeka & Santa Fe Ry.*, 877 P.2d 11, 16 (Kan. Ct. App. 1994) ("The federal district court's decision that the RLA did not preempt McIntosh's claims was not binding on the state district court [following remand]."); *Provience* v. *Valley Clerks Trust Fund*, 163 Cal. App. 3d 249, 256–257 (1984) (refusing to accord law of the case status to remanding district court's rejection of federal preemption defense).

But other state courts asked to accord preclusive effect to remands under SLUSA likely will decline to follow the ERISA decisions. A state court might well distinguish the ERISA cases by relying on the difference in standards under ERISA for determining whether a state-law action is "completely preempted" (thus authorizing removal under *Metro. Life Ins. Co.* v. *Taylor*, 481 U.S. 58, 63–64 (1987)), and whether a state-law action is merely "substantively preempted" on the merits. Such a court could reason that an ERISA defendant may not remove a state-law claim to federal court because the claim falls outside of the ambit of "complete preemption," but nevertheless enjoys a substantive preemption defense under 29 U.S.C. § 1144. See, *e.g.*, *Dukes* v. *U.S. Healthcare, Inc.*, 57 F.3d 350, 355 (3d Cir. 1995). On petitioners' reading of SLUSA, though, there is no such distinction between the standard governing remand and the one determining the outcome of the merits of the preemption defense.

Moreover, even if a state court does not accord full preclusive effect to the remanding judge's rejection of SLUSA preemption, a second obstacle to revisiting that rejection remains: as a practical matter, state courts are likely to defer to the federal court's judgment that federal law does not preempt a state rule. See, *e.g.*, *Abela* v. *General Motors Corp.*, 677 N.W.2d 325, 327 (Mich. 2004) (lower federal court decisions on federal law persuasive if not binding); *Etcheverry* v. *Tri-Ag Serv., Inc.*, 993 P.2d 366, 368 (Cal. 2000) ("decisions of the lower federal courts * * * on federal questions * * * are persuasive and entitled to great weight"); *Cimarron Foothills Community Ass'n* v. *Kippen*, 79 P3d 1214, 1217 (Ariz. App. Div. 2003) ("We generally defer to federal courts' interpretation of federal law.").

The consequence of petitioners' approach accordingly would be that the district court's decision to remand would effectively resolve the SLUSA preemption claim. This would

make for an asymmetrical rule: although a defendant whose preemption claim was rejected could not obtain appellate review (or an appellate determination in state court) regarding preemption, plaintiffs whose claims were held preempted could test that decision on appeal. It is difficult to believe that Congress, which enacted SLUSA specifically to keep combat abusive securities claims, meant to establish such a regime.

b. That is particularly so because petitioner's approach would have effects that are directly contrary to SLUSA's goals. Most obviously, perhaps, a bar on appellate review would make it virtually impossible to achieve uniformity in the law. That prospect already is apparent: "the district court cases appear to be all over the map on the issue of what state law claims are preempted by SLUSA." *Magyery* v. *Transamerica Fin. Advisors, Inc.*, 315 F. Supp. 2d 954, 959 (N.D. Ind. 2004). Needless to say, that outcome "squarely conflicts with the congressional preference for 'national standards for securities class action lawsuits involving nationally traded securities.'" *Dabit*, slip op. 14 (quoting SLUSA § 2(5), 112 Stat. 3227).

The certainty of disparate results, moreover, necessarily means that district courts will, not infrequently, err when rejecting claims of preemption. Though the error rate of district courts is difficult to estimate, figures for the twelve-month period ending March 31, 2005, indicate that the courts of appeals reversed district court decisions in private civil actions in almost twelve per cent of appeals, with the reversal rate approaching twenty per cent in the Seventh Circuit. Administrative Office of the U.S. Courts, *Federal Judicial Caseload Statistics, March 31, 2005* tab. B–5, at http://www.uscourts.gov/caseload2005/tables/B05mar05.pdf. These figures doubtless significantly understate the likelihood of error where SLUSA claims are involved. The reversal rate for complex cases was higher; for example, courts of appeals

reversed 17.5 per cent of bankruptcy appeals, with that rate exceeding forty per cent in the Third Circuit. *Ibid.* And Judge Newman's study of reversals in the Second Circuit reported that the most frequently reversed category of decisions in the two-year sample, not counting "miscellaneous," were those interpreting federal statutes. Newman, *A Study of Appellate Reversals*, 58 BROOK. L. REV. 629, 633 (1992).

Although these reversal rates provide only a rough proxy for the rate of judicial error, they do suggest that a substantial number of decisions to remand under SLUSA will be wrong. And the risk of error would be compounded yet again if, as petitioners contend, review of decisions to remand is unavailable. As Judge Posner has observed, it is the "reversal threat" that keeps district judges "working carefully." Posner, *Judicial Behavior and Performance: An Economic Approach*, 32 FLA. ST. U. L. REV. 1259, 1271 (2005); see also Haire, Lindquist & Songer, *Appellate Court Supervision in the Federal Judiciary: A Hierarchical Perspective*, 37 LAW & SOC'Y REV. 143, 147 (2003) (attributing efficacy of circuit court review of district judges' decision-making to esteem in which low reversal rate held, internalized professional norms of *stare decisis*, and desire to avoid the additional work a reversed or vacated decision entails). Or, to quote Judge Coffin: "one reversal is worth a hundred lectures." Coffin, ON APPEAL 163 (1994).

c. This lack of uniformity would be problematic in itself. But it also would undermine SLUSA's most fundamental goals in another way: disparate approaches to the question of preemption would allow class action plaintiffs to strategically file in jurisdictions where district courts are likeliest to reject removal and where, after remand, the state courts are known to apply a rule that precludes relitigation of a SLUSA preemption defense. Because issuers cannot control where their securities are traded, they will not be able to avoid jurisdictions presenting unreasonable litigation risk profiles — an

important component of which is the opportunity to appeal erroneous SLUSA remand orders.

The consequences of erroneously permitting state-law class actions to proceed would be significant. Such suits, of course, would not be governed by the PSLRA's rules and thus would present all of the dangers that prompted the PSLRA's enactment: they could premise liability on forward-looking statements, would not make use of the discovery stay and pleading standards that have curbed abusive discovery, and would not apply the lead plaintiff rules that discourage the "race to the courthouse door." Indeed, some types of state-law actions present especially tempting vehicles for strike suits. The claim in this case, for example — one on behalf of holders of securities rather than purchasers or sellers — is not recognized under federal law precisely because it is of the sort that is likely to "lead to large judgments, payable in the last analysis by innocent investors, for the benefit of speculators and lawyers." *Blue Chip Stamps*, 421 U.S. at 739 (quoting *SEC* v. *Texas Gulf Sulphur*, 401 U.S. 833, 867 (2d Cir. 1968) (Friendly, J., concurring)).

The danger that some abusive suits will improperly escape preemption could have an effect that transcends the impact of individual judgments or settlements. The prospect of even episodic liability inevitably will chill use of the PSLRA safe harbor, deter individuals from serving as independent directors, and discourage accounting firms from providing audit services for newer and smaller companies — that is, the very harms that Congress sought to prevent when it enacted the PSLRA and SLUSA.

d. The risk that petitioners' rule would encourage plaintiffs to file suit in jurisdictions where they hope to achieve a remand if the case is removed to federal court — and the likelihood that success with this tactic would lead plaintiffs to file abusive suits that could not have survived in federal court — is not at all fanciful. Empirical data on class-action

filings confirm that the plaintiffs' bar believes that its chances of prevailing in dubious class actions are best in state courts. A study of class actions filed against Fortune 500 companies from 1988 to 1998, for example, revealed that the number of filings in state court during that period skyrocketed by 1,042 per cent; the relevant number for filings in federal court increased only 338 per cent over the same period.[8]

The perception that some state courts provide a friendly forum for class action litigation is, unfortunately, rooted in reality. Testimony by the U.S. Department of Justice on the need for class-action reform noted that "certain local courthouses have become known for the ease with which they certify class actions," and that the "threat of large awards arising out of class actions filed in these jurisdictions coerces defendants to agree to disproportionately high settlement amounts." *Class Action Lawsuits: Hearing Before the S. Comm. on the Judiciary*, 108th Cong. (2003) (testimony of Viet Dinh), available at 2003 WL 21130259. And Congress has recently found that a common characteristic of cases exhibiting the worst abuses of the class-action device is "adjudicat[ion] in state courts, where the governing rules are applied inconsistently (frequently in a manner that contravenes basic fairness and due process considerations) and where there is often inadequate supervision over litigation procedures and proposed settlements." S. Rep. No. 109–14, at 5 (2005).

This is not to suggest, of course, that state courts generally will be hostile to preemption rules such as those enacted by SLUSA. Cf. Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1115–1130 (1977). But plaintiffs have proved able to engage in forum shopping by filing nationwide class

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[8] See Federalist Society, *Analysis: Class Action Litigation—A Federalist Society Survey*, 1 Class Action Watch, at http://www.fedsoc.org/Publications/classactionwatch/volume1issue1.htm.

actions in those few jurisdictions with reputations for disregarding class-action certification requirements and the due process rights of both out-of-state defendants and class members. A study conducted in three such venues revealed exponential increases in the numbers of class actions filed in recent years; for example, the Circuit Court of rural Madison County, Illinois — the venue where petitioners brought *this* action — saw an increase in the number of filings of 1,850 per cent from 1998 to 2000. See Beisner & Miller, *They're Making A Federal Case Out Of It...In State Court*, 25 HARV. J. L. & PUB. POL'Y 143, 161 (2001). See also Howard, *Class Actions Set Record Last Year In Madison County; Possible Change In Law Prompted Rush In Filing*, ST. LOUIS POST DISPATCH, Jan. 11, 2004, at E4; Beisner & Miller, *Class Action Magnet Courts: The Allure Intensifies*, 4 BNA CLASS ACTION LITIG. REP. 58 (Jan. 24, 2003).

Congress has expressed alarm at the tendency of these class-action magnet state courts to "issue[] nationwide rulings that actually contradict the laws of other states." S. Rep. No. 109–14, at 24; see also *id.* at 24–26 (providing examples). In fact, some state courts have demonstrated a willingness to certify almost any class action, even classes that other courts applying the same procedural rules have found uncertifiable. See *id.* at 22–23. Occasionally, these certifications have come even before the out-of-state defendant had a chance to respond to the complaint. *Id.* at 21–22.[9]

It was, of course, this very sort of manipulation that prompted enactment of SLUSA — and that made the re-

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[9] These concerns led to enactment of the Class Action Fairness Act of 2005 ("CAFA"), Pub. L. No. 109-2, 119 Stat. 4, which broadly provides for the removal of national class actions from state to federal court. As petitioners recognize (Pet. Br. 30 & n.38), however, the existence of the comprehensive PSLRA and SLUSA regime led Congress to exempt securities class actions from the CAFA.

moval provision a "key" element of the statute. *Dabit*, slip op. 10 n.7. Petitioners' reading would significantly reduce the efficacy of the removal guarantee and invite continued efforts to circumvent Congress's attempt to work a comprehensive reform of securities class-action litigation. As in *Dabit*, then, "[t]he background, the text, and the purpose" of SLUSA "all support the broader interpretation adopted by the Seventh Circuit." *Id.* at 1.

II. THE BAR ON APPELLATE REVIEW OF REMANDS DOES NOT EXTEND TO CIRCUMSTANCES IN WHICH THE MERITS AND JURISDICTIONAL INQUIRIES ARE IDENTICAL

For the reasons discussed above, petitioners misunderstand SLUSA's removal provision; under that statute, the questions of removability and preemption are discrete ones that are governed by distinct standards — meaning that a district court's decision rejecting a SLUSA preemption defense is reviewable on appeal as a matter of course. But if we are wrong in that submission, the decision below still should be affirmed. If the merits and removability inquiries are identical under SLUSA, petitioners' assertion that 28 U.S.C. § 1447(d) precludes appeal of the district court's decision to remand cannot be squared with principles governing removal that have been articulated by this Court.

It is settled that "Section 1447(d) is not dispositive of the reviewability of remand orders in and of itself." *Thermtron Prods., Inc.* v. *Hermansdorfer*, 423 U.S. 336, 345 (1976). Instead, the limits on appealability stated in that provision "must be construed together" with the standards for removal set out in Section 1447(c) and in light of the purposes animating both provisions. *Ibid.* And there can be no dispute as to the goal of Section 1447(d): it effectuates "the policy of not permitting interruption of the litigation of the merits of a removed cause by prolonging litigation of questions of juris-

diction of the district court to which the case is removed." *United States* v. *Rice*, 327 U.S. 742, 751 (1946). See *Thermtron*, 423 U.S. at 351 (Section 1447(d) intended "to prevent delay in the trial of remanded cases by protracted litigation of jurisdictional issues"). Thus, "Congress' concern that parties might use the appeal process to protract litigation over jurisdictional issues and thereby further delay litigation over the merits of the case reflects a balancing of competing interests resolved in favor of judicial economy." *Pelleport Investors, Inc.* v. *Budco Quality Theatres, Inc.*, 741 F.2d 273, 277 (9th Cir. 1984).

As suggested by this policy, the Court has recognized that Section 1447(d) bars appeal of a district court's decision to remand on the basis of jurisdictional or procedural flaws that were peripheral to the merits of the litigation — for example, where there was a dispute about the existence of diversity or the amount in controversy. See, *e.g.*, *Volvo of Am. Corp.* v. *Shwarzer*, 429 U.S. 1331 (1976) (case remanded for failure to satisfy amount-in-controversy requirement); *Gravitt* v. *Southwestern Bell Tel. Co.*, 430 U.S. 723 (1977) (case remanded for lack of diversity; see *Gravitt* v. *Southwestern Bell Tel. Co.*, 396 F. Supp. 948 (W.D. Tex. 1975)); *Things Remembered, Inc.* v. *Petrarca*, 516 U.S. 124, 125–26 (1995) (remand based on untimely removal). In such cases, the bar on appeal furthers the congressional goal because "[t]he only thing that is at stake is the forum that will hear a claim. This is certainly not an unimportant matter, but it is not so fundamental that a second or third layer of judges must test its correctness." *Adkins* v. *Ill. Cent. R.R. Co.*, 326 F.3d 828, 832 (7th Cir. 2003).

This case, however, involves considerations that are decisively different. Here, the jurisdictional issue (on petitioners' own view of the case) is not distinct from the merits; to the contrary, petitioners submit that determination of jurisdiction requires *resolution* of the merits of one of the principal de-

fenses to liability. Moreover, for the reasons addressed above, that resolution is likely to be final and not subject to renewed litigation upon the case's return to state court. In such circumstances, an appeal of the district court's decision would not "delay litigation over the merits of the case" (*Pelleport Investors*, 741 F.2d at 277); it would *constitute* litigation of the merits.

The Court has never suggested that Section 1447(d) precludes appellate review in such a case, where the decision to remand resolves a significant portion of the merits of the litigation. Indeed, in closely analogous circumstances, the Court has held that appeal is permissible. In *Waco* v. *United States Fid. & Guar. Co.*, 293 U.S. 140 (1934), the district court dismissed the one diverse party from the suit and then, finding that it lacked jurisdiction, remanded the case to state court. See *id.* at 141–142. This Court recognized that "no appeal lies from the order of remand." *Id.* at 143. But the Court nevertheless held that appeal of the dismissal was proper, emphasizing that dismissal of the diverse party, "if not reversed or set aside, is conclusive upon the petitioner." *Id.* at 143–144.

The same outcome is appropriate here.[10] The rationale for precluding appeal of remand orders — avoiding delay in adjudication of the merits — is wholly inapplicable to cases like this one. Indeed, applying the reviewability bar of Section 1447(d) in this case would turn the statutory purpose on its head; it would convert a shield against the use of litigation over peripheral jurisdictional matters for purposes of delay

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[10] In *Waco*, the Court anticipated that the case would be returned to state court following the federal appeal contesting dismissal of the diverse party. See 293 U.S. at 193–194. Such a course could be followed here, although, if the federal court of appeals holds the plaintiffs' claims preempted, the only proper disposition on remand to state court would be dismissal of their claims.

into a sword that prevents defendants from fully contesting liability. As the Ninth Circuit put it in similar circumstances, such an approach "would leave matters of substantive * * * law unreviewable" and "would deprive [the defendant] of its right to appeal a substantive determination of [preemption] law. We cannot believe that Congress intended to immunize such decisions from review." *Pelleport Investors*, 741 F.2d at 277.[11] Section 1447(d) should not be construed "so woodenly" (*Thermtron*, 423 U.S. at 352) as to insulate a ruling on the merits from all review so as to advance a policy of avoiding delay in resolving the merits. See, *e.g.*, *Rowland* v. *California Men's Colony*, 506 U.S. 194, 200 (1993) (noting "the common mandate of statutory construction to avoid absurd results").

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[11] This Court has recognized in related settings that statutory restrictions on appeal must yield when, in particular circumstances, effective review otherwise would be precluded altogether. The collateral order doctrine reflects this norm; federal appellate review is permitted when awaiting final judgment might make important rulings effectively unreviewable. See *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 468 (1978); *Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949); see also *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 11 (1983) ("This order would be entirely unreviewable if not appealed now. Once the state court decided the issue of arbitrability, the federal court would be bound to honor that determination as res judicata."); cf. *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539, 546 (1976) ("capable of repetition, yet evading review" exception to mootness limitation on standing).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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No. 05-409

IN THE

Supreme Court of the United States

CARL KIRCHER, *et al.*,
Petitioners,

v.

PUTNAM FUNDS TRUST, *et al.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

BRIEF OF LAW PROFESSORS ARTHUR R. MILLER, E. FARISH PERCY, MICHAEL E. SOLIMINE, AND JILL E. FISCH AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. The *Thermtron* Exception Is Not Supported by the Text of § 1447(d) and Should Not Be Extended. .. 4

II. *Thermtron*'s Holding Undermines the Purpose of § 1477(d) by Encouraging Appeal as a Delaying Tactic. 9

III. The District Court's Remand Order in this Case Falls Well Outside the Scope of the *Thermtron* Exception. 14

A. The District Court Dismissed on Grounds of Subject Matter Jurisdiction. .. 14

B. The Seventh Circuit Impermissibly Second-Guessed the District Court's Remand Decision. 16

CONCLUSION 18

TABLE OF AUTHORITIES

CASES

Abada v. Charles Schwab & Co.,
300 F.3d 1112 (9th Cir. 2002) 15

In re Amoco Petroleum Additives Co.,
964 F.2d 706 (7th Cir. 1992) 6, 11, 13, 17

Archuleta v. Lacuesta,
131 F.3d 1359 (10th Cir. 1997) 12

Balazik v. County of Dauphin,
44 F.3d 209 (3d Cir. 1995) 12

Baldridge v. Kentucky-Ohio Transp., Inc.,
983 F.2d 1341 (6th Cir. 1993) 16

Beneficial Nat'l Bank v. Anderson, 539 U.S. 1 (2003) ... 16

Cohen v. Beneficial Indus. Loan Corp.,
337 U.S. 541 (1949) 7-8

Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978) 8

Edelman v. Lynchburg College, 535 U.S. 106 (2002) 6

Falkowski v. Imation Corp.,
309 F.3d 1123 (9th Cir. 2002) 16

Gillespie v. United States Steel Corp.,
379 U.S. 148 (1964) 8

Glasser v. Amalgamated Workers Union Local 88,
806 F.2d 1539 (11th Cir. 1986) 16

Gonzalez-Garcia v. Williamson Dickie Mfg. Co.,
99 F.3d 490 (1st Cir. 1996) 16

Heaton v. Monogram Credit Card Bank,
231 F.3d 994 (5th Cir. 2000) 11

Kircher v. Putnam Funds Trust,
373 F.3d 847 (7th Cir. 2004) 13

Mangold v. Analytic Servs., Inc.,
77 F.3d 1442 (4th Cir. 1996) 12

Nutter v. Monogahela Power Co.,
4 F.3d 319 (4th Cir. 1993) 16

Smith v. Texas Children's Hosp.,
172 F.3d 923 (5th Cir. 1999) 16

Spielman v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,
332 F.3d 116 (2d Cir. 2003) 7, 9, 15, 16

In re TMI Litig. Cases Consol. II,
940 F.2d 832 (3d Cir. 1991) 4

Thermtron Prods., Inc. v. Hermansdorfer,
423 U.S. 336 (1976) ... 2, 3, 4, 10, 11, 13, 14, 16, 17

Things Remembered, Inc. v. Petrarca,
516 U.S. 124 (1995) 4, 7, 9

Trans Penn Wax Corp. v. McCandless,
50 F.3d 217 (3d Cir. 1995) 16

United States v. Rice, 327 U.S. 742 (1946) ... 2, 3, 4, 5, 6, 9

United States v. Rodgers, 466 U.S. 475 (1984) 5

Van Cauwenberghe v. Biard, 486 U.S. 517 (1988) 7

Whitman v. Raley's Inc., 886 F.2d 1177 (9th Cir. 1989) .. 16

Williams v. AFT Enters., Inc.,
389 F.3d 1185 (11th Cir. 2004) 15

STATUTES

15 U.S.C. § 77p(c) 14

15 U.S.C. § 77p(b) 15

15 U.S.C. § 77p(d)(4) 9

28 U.S.C. § 1291 7

28 U.S.C. § 1447(c) 4, 5

28 U.S.C. § 1447(d) 2, 3, 4, 5, 6

28 U.S.C. §1453(c)(1) 6

MISCELLANEOUS

Administrative Office of the United States Courts, 2004 Annual Report of the Director, Table B-4, *available at* http://www.uscourts.gov/judbus2004/appendices/b4.pdf 5, 7

Thomas R. Hrdlick, *Appellate Review of Remand Orders in Removed Cases: Are They Losing a Certain Appeal?*, 82 Marq. L. Rev. 535 (1999) 5, 7

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Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3740 (3d ed. 1998) 1, 3, 7, 10

INTERESTS OF AMICI CURIAE[1]

Professor Arthur. R. Miller is the Bruce Bromley Professor of Law at the Harvard Law School. He has devoted his teaching and writing career to an understanding of federal courts, civil procedure, and federal practice. Among his numerous publications are the leading treatise in federal practice and the leading casebook in civil procedure: Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* (West 2005); Jack H. Friedenthal, Arthur R. Miller, John E. Sexton & Helen Hershkoff, *Civil Procedure: Cases and Materials* (Thomson West 9th ed. 2005). In addition, he has written numerous articles and consulted on numerous cases raising novel issues of federal practice and procedure.

Assistant Professor E. Farish Percy joined the faculty at the University of Mississippi School of Law in 2001 and teaches Civil Procedure, Torts, and Insurance. Much of her recent research has been devoted to the issue of federal court jurisdiction. She has recently written two law journal articles proposing a framework to be used by federal district courts when evaluating allegations of fraudulent joinder in cases where removal is based on federal diversity jurisdiction.

Professor Michael E. Solimine is the Donald P. Klekamp Professor of Law at the University of Cincinnati College of Law, where he has been a member of the faculty since 1987. He teaches and has written numerous articles on

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[1]The parties have consented to the filing of this brief. Letters of consent to the filing of this brief are being filed in conjunction with this brief. Pursuant to this Court's Rule 37.6, counsel states that this brief was not authored in whole or in part by counsel for a party and that no one other than amici and their counsel made a monetary contribution to the preparation or submission of this brief.

civil procedure and federal courts. He also written extensively on federal appellate practice, and is the co-author of the new edition of a leading appellate practice case book: Robert J. Martineau, Kent Sinclair, Michael E. Solimine & Randy J. Holland, *Appellate Practice and Procedure: Cases and Materials* (Thomson West 2d ed. 2005).

Professor Jill E. Fisch is the Alpin J. Cameron Professor of Law at Fordham Law School, where she has been a member of the faculty since 1989. She teaches Corporate Law, Securities Regulation, and Federal Courts. Professor Fisch's scholarship includes work on corporate law, securities regulation, and federal courts and has appeared in a variety of publications including the Harvard Law Review, the Yale Law Journal, the Columbia Law Review, and the Cornell Law Review.

Having devoted their careers to teaching and writing about the federal courts and working for their improved administration, amici have a keen interest in seeing that those courts function efficiently. It is equally important that the lower federal courts function only as Congress has authorized. Unless the court below is reversed, appellate panels will continue to entertain appeals that Congress has specifically prohibited.

SUMMARY OF ARGUMENT

Prior to *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1976), this Court had consistently held that 28 U.S.C. § 1447(d) and its predecessors forbade appeal of a district court's remand order under *any* circumstances. *See United States v. Rice*, 327 U.S. 742, 749 (1946). This time-honored bar to appellate review of remand orders rested on Congress's legislative "policy of not permitting interrupt[ion] of the litigation of the merits of a removed cause by prolonged litigation of questions of jurisdiction of the district court to

which the cause is removed." *Id.* at 751. In an apparent effort to address an injustice in a particular case, *Thermtron* for the first time created an exception to § 1447(d)'s categorical rule, holding despite the statute's plain language that when a district court's decision to remand is based on "grounds not provided by [] statute," the court's order is subject to appellate review. *Thermtron*, 423 U.S. at 349.

Chief Justice Rehnquist, then Associate Justice, in his dissent in *Thermtron* called the Court's new exception "both unworkable and portentous of the significant impairment of Congress's carefully worked out scheme." *Id.* at 357 (Rehnquist, J., dissenting). Chief Justice Rehnquist's words have proved prophetic. In the years since *Thermtron*, the lower courts have struggled with the limits of the exception, creating several circuit splits and eviscerating Congress's clear statutory rule. *See* 14C Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3740 (3d ed. 1998). In practice, *Thermtron* has allowed defendants to undermine the purpose of § 1447(d) by subjecting plaintiffs in state court actions to unjustified delays during the appeal of a district court's remand order.

Because it is difficult or impossible to distinguish a remand order that is not authorized by statute and is thus subject to appeal under *Thermtron* from a remand order that is merely erroneous and thus unappealable under § 1447(d), the Court should take this opportunity to limit *Thermtron* to its facts and thereby end the confusion in the lower courts. In any case, the district court's decision below specifically purported to be based on a lack of subject matter jurisdiction and is therefore barred from appellate review by § 1447(d).

ARGUMENT

I. The *Thermtron* Exception Is Not Supported by the Text of § 1447(d) and Should Not Be Extended.

It is difficult to imagine how Congress could more clearly have expressed an intent to bar all appellate review of remand orders than it did in 28 U.S.C. § 1447(d): "An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise . . . ." Prior to *Thermtron*, the Court faithfully enforced Congress's explicit statutory bar "regardless of the reasons underlying the [district court's] decision to remand." *In re TMI Litig. Cases Consol. II*, 940 F.2d 832, 840 (3d Cir. 1991). Indeed, since the first predecessor to § 1447(d) was enacted in 1887, the Court had consistently held that *no* appeal of remand orders was permissible under the statute. *See Rice*, 327 U.S. at 749.

Thermtron for the first time created an exception to this categorical rule, holding that the basis of the district court's decision to remand in that case—its crowded dockets—was one that the court "had no authority to consider." *Thermtron*, 423 U.S. at 351. The Court held that § 1447(d) "must be read *in pari materia* with § 1447(c), so that only remands based on grounds specified in § 1447(c) are immune from review under § 1447(d)." *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 127 (1995). Thus, courts of appeals had jurisdiction over a remand order as long as the remand was not based on either a defect in removal procedure or a lack of subject-matter jurisdiction—the two grounds for remand recognized by § 1447(c). *Id.* at 127-28.[2]

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[2]In 1996, Congress amended § 1447(c) to read:

(continued...)

Given the unambiguous statutory language of § 1447(d), however, the Court's resort in *Thermtron* to a canon of statutory construction for its interpretation of the statute is, with all respect, unconvincing. Section 1447(d) states simply and plainly that *any* order remanding a case is unreviewable. As the Court noted in *Rice* when construing § 1447(d)'s predecessor, "[s]tatutory language and objective, thus appearing with reasonable clarity, are not to be overcome by resort to a mechanical rule of construction, whose function is not to create doubts, but to resolve them when the real issue or statutory purpose is otherwise obscure." *Rice*, 327 U.S. at 752-53. The plain meaning of § 1447(d) does not lead to results that are "absurd or glaringly unjust," *United States v. Rodgers*, 466 U.S. 475, 484 (1984) (quotation omitted), and is therefore

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[2](.. continued)

> A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.

28 U.S.C. § 1447(c). By changing the statute to cover remands based on both defects of subject matter jurisdiction and defects "other than lack of subject matter jurisdiction," the statute's new language appears to cover *all* remands, and *Thermtron*'s distinction between those remands that are authorized by § 1447(c) and those that are not seems no longer to have any basis in the language of the statute. The legislative history of the amendment, however, indicates that it was not intended to effect a substantive change. *See* Thomas R. Hrdlick, *Appellate Review of Remand Orders in Removed Cases: Are They Losing a Certain Appeal?*, 82 Marq. L. Rev. 535, 561-69 (1999) (examining the legislative history).

controlling. Yet, the Court's decision in *Thermtron* discounted the clear statutory language, holding in effect "that § 1447(d) does not mean what it says." *In re Amoco Petroleum Additives Co* , 964 F.2d 706, 708 (7th Cir. 1992).

The decision in *Thermtron* also discounted the Court's uninterrupted history of interpreting § 1447(d)'s predecessor statutes to prohibit *all* appellate review of remand orders. *Rice*, 327 U.S. at 752 (noting the "universality of the practice" of denying review of remand orders). Congress is presumed to have been aware of this unanimous judicial authority when it enacted the present version of § 1447(d). *See Edelman v. Lynchburg College*, 535 U.S. 106, 116-17 (2002) (noting that Congress is presumed to know of and incorporate settled judicial doctrines when enacting and amending statutes). In those instances where Congress has intended to create an exception to the general rule of non-appealability, it has not hesitated to provide the necessary statutory language. For example, § 1447(d) itself provides that civil rights cases "removed pursuant to section 1443 of this title *shall be reviewable* by appeal or otherwise" (emphasis added). Congress has created a total of four such exceptions to § 1447(d).[3]

[3]Another example is the recently enacted Class Action Fairness Act of 2005, which provides that, "*notwithstanding section 1447(d)*, a court of appeals may accept an appeal from an order of a district court granting or denying a motion to remand a class action to the State court from which it was removed." 28 U.S.C. § 1453(c)(1) (emphasis added). Two other exceptions allow the United States to appeal remands in cases involving Native American tribes and the Federal Deposit Insurance Corporation and the Resolution Trust Corporation to appeal remands in cases where they are parties. Rhonda Wasserman, *Rethinking Review of Remands: Proposed Amendments to the Federal Removal Statute*, 43 Emory L.

(continued)

Since *Thermtron* was decided, it has faced substantial academic criticism on the ground that it ignored Congress's clearly expressed intent to bar appellate review of remand orders,[4] and this Court has generally rejected attempts to further expand the scope of the exception. *See Things Remembered*, 516 U.S. at 129. Nevertheless, as explained in the following section, the Court's decision in *Thermtron* to allow an appeal under the facts of that particular case has led to a widespread disregard of the statute's plain meaning in the lower courts. To prevent any additional erosion of § 1447(d)'s clearly expressed rule, the Court should limit *Thermtron* to the particular facts of that case, leaving any further modifications of § 1447(d) to Congress. *See Spielman v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 332 F.3d 116, 127 (2d Cir. 2003) ("It is not our place as jurists to supply that which is omitted by the legislature.").

Developments before this Court in another area of appellate jurisdiction parallel the approach that amici urge here with respect to *Thermtron*. The principal basis for federal appellate jurisdiction is 28 U.S.C. § 1291, under which litigants may appeal only from "final decisions" of the district courts. In general, § 1291 means what is says: A final decision is one that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Van Cauwenberghe v. Biard*, 486 U.S. 517, 521-22 (1988) (quotation omitted). Under

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[3](...continued)
J. 83, 104-08 (1994).

[4]*See, e.g.*, Hrdlick, *supra* note 2; Thomas F. Lamprecht, Note, *How Can It Be Wrong When It Feels So Right? Appellate Review of Remand Orders Under the Securities Litigation Uniform Standards Act*, 50 Vill. L. Rev. 305 (2005); Michael E. Solimine, *Removal, Remands, and Reforming Federal Appellate Review*, 58 Mo. L. Rev. 287 (1993); Wasserman, *supra* note 3; *see also* 14C Wright, Miller & Cooper, *supra*, § 3740, at 525-27.

Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949), § 1291 also includes a narrow category of orders that do not end the entire litigation, but finally decide an important issue that is wholly collateral to the merits of the litigation, review of which is necessary to prevent irreparable harm. Some fifteen years later, however, in *Gillespie v. United States Steel Corp.*, 379 U.S. 148 (1964), the Court took *Cohen* well beyond its original narrow purpose and allowed an interlocutory appeal simply where the district court had dismissed one set of claims on their merits but not another. The Court acknowledged that appellate review in that case "could be called 'piecemeal,'" but justified erosion of the "final decision" rule based on the Court's own view of "the inconvenience and cost" of trying the case prior to appeal, and its concern that delay in resolving the claims could work "a great injustice" to the plaintiffs. *Id.* at 153. In dissent, Justice Harlan noted that these reasons "furnishe[d] no excuse for avoidance of the finality rule," and sounded an alarm, not unlike the alarm sounded by Chief Justice Rehnquist in *Thermtron*, that such arguments could support review in many interlocutory appeals. *Id.* at 167-70 (Harlan, J., dissenting).

In *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978), the Court put on the brakes. After holding that a district court order denying class certification is not an appealable collateral order under *Cohen*, the Court rejected the plaintiffs' reliance on *Gillespie*, effectively ending its relevance as a § 1291 precedent. "If *Gillespie* were extended beyond the unique facts of that case," Justice Stevens explained, "§ 1291 would be stripped of all significance." *Id.* at 477 n.30. So, too, here, if *Thermtron* were allowed to expand beyond its highly unusual circumstances, the strict no-appeal policy expressed by Congress in § 1447(d) would be seriously eroded, if not destroyed entirely.

In this case, the court of appeals found a new implicit exception to § 1447(d) for cases remanded pursuant to SLUSA's remand provision. Congress, however, is aware of the presumption that § 1447(d)'s bar to appellate review applies "regardless of whether removal was effected pursuant to § 1441(a)" (which is the general removal statute) or "under *any other statutes*, as well." *Things Remembered*, 516 U.S. at 128 (quotation omitted). "Absent a clear statutory command to the contrary," Congress is presumed to have intended § 1447(d)'s bar to apply. *Id.* The remand provision in SLUSA does not contain a "clear statutory command" demonstrating a congressional intent to authorize review of SLUSA remand orders. 15 U.S.C. § 77p(d)(4); *see Spielman*, 332 F.3d at 127 ("Conspicuously absent from SLUSA is any express language suggesting that it operates to override the appealability exclusion of Section 1447(d)."). In contrast to SLUSA's statutory silence, Congress in the Class Action Fairness Act of 2005 specifically provided for *permissive* appellate review "*notwithstanding section 1447(d)*." *See supra* note 3. Absent such an unambiguous command, this Court should reject the Seventh Circuit's attempt to carve out a new exception to § 1447(d)'s rule.

II. *Thermtron*'s Holding Undermines the Purpose of § 1447(d) by Encouraging Appeal as a Delaying Tactic.

The bar to appellate review of remand orders arises from Congress's "policy of not permitting interrupt[ion] of the litigation of the merits of a removed cause by prolonged litigation of questions of jurisdiction of the district court to which the cause is removed." *Rice*, 327 U.S. at 751. Congress understood that district courts are not infallible and that some remand orders—presumably a small minority—would be erroneously granted. Nevertheless, a defendant whose case is

mistakenly remanded to state court can still obtain a fair trial in that forum, and, in Congress's judgment, any degree of prejudice resulting from denying defendants their forum of choice is outweighed by the importance of avoiding prolonged delays in federal court. *See Thermtron*, 423 U.S. at 355 (Rehnquist, J., dissenting). By providing removal to the district court but disallowing appeals, Congress struck a balance between the desirability of allowing access to a federal forum and the significant costs of delay on appeal. *Id.* at 354-55.

The Court in *Thermtron* apparently expected the exception it created to § 1447(d)'s previously firm rule to be a narrow one. After *Thermtron*, the particular basis for the district court's remand in that case—its clogged dockets—cannot be expected to be invoked explicitly as a ground for remand by district courts. *Thermtron*, however, has not been limited to that ground. Courts of appeals have often been reluctant to let pass a district court's perceived mistakes and, as in this case, have stretched to find the authority to correct them. Indeed, commentators have noted that "[a]t virtually every opportunity, many of the lower courts chose to expand *Thermtron* and create additional exceptions to Section 1447(d)." Solimine, *supra* note 4, at 332; *see also* 14C Wright, Miller & Cooper, *supra*, § 3740 (documenting the long line of lower court cases struggling with the application of *Thermtron* and expanding its scope); Lamprecht, *supra* note 4, at 312 (noting that courts have "whittled away at [§ 1447(d)'s] seemingly decisive language"); Wasserman, *supra* note 3, at 119. The result has been a "gradual evisceration" of the § 1447(d) bar. Lamprecht, *supra* note 4, at 311; *see also* Solimine, *supra*, at 288-89 (noting that post-*Thermtron* cases in the lower courts "permit federal appellate review of district

court remand orders in a wide variety of circumstances.").[5]

The rule set forth in *Thermtron* does not give lower courts sufficient guidance about where to draw the line between what is appealable and what is not. *Thermtron* itself held that the district court's remand order was appealable when granted on "grounds not provided by [] statute." *Thermtron*, 423 U.S. at 349. But, as Chief Justice Rehnquist pointed out in his *Thermtron* dissent, a district court can be said to be acting outside its statutory authority *any* time its grant of remand is held to be erroneous. *Id.* at 356 (Rehnquist, J., dissenting). Although the *Thermtron* majority cautioned that a remand premised on grounds authorized by statute would be unreviewable "whether erroneous or not," *id.* at 343, lower courts have had a difficult time applying this distinction. *See Amoco*, 964 F.2d at 708-09. For example, district courts sometimes remand on purportedly jurisdictional grounds, but either do not explain the basis for their lack of jurisdiction or provide an explanation that is not jurisdictional in nature. *See Thermtron*, 423 U.S. at 357 (Rehnquist, J., dissenting). This problem has led to a circuit split on the question whether the district court's mere use of the word "jurisdiction" is sufficient to deny appellate review, even when it is apparent that the court's ruling was actually on a non-jurisdictional and impermissible ground.[6]

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[5]A recent Westlaw search identified 250 cases in the previous ten years in which courts of appeals had to construe and apply § 1447(d). Among the reported cases, the majority of cases allowed review; even counting the unreported cases, more than 40 percent of the appealed remands were found to be within the court's appellate jurisdiction.

[6]*Compare Heaton v. Monogram Credit Card Bank*, 231 F.3d 994, 997 (5th Cir. 2000) (holding that a court of appeals may review a remand order "only if the district court clearly and affirmatively

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Unfortunately, the courts of appeals' allowance of appellate review in *some* remand cases effectively allows appellate review in *all* remand cases. Defendants in state court actions can always argue that appellate review of the district court's remand decision should be available under an exception to § 1447(d). These appeals do not need to be meritorious to achieve the purpose of delay; it was, after all, primarily a concern with the possibility of the delay resulting from *unmeritorious* removals that caused Congress to enact the appeals bar in the first place and there is thus no reason to think that litigants who engage in such removals will not press their positions on appeal. The median length of an appeal in the federal courts of appeals is 11.4 months.[7] By appealing a

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[6](. continued)
relies on a non-section 1447(c) basis") (quotation omitted), *with Mangold v. Analytic Servs., Inc.*, 77 F.3d 1442, 1450 (4th Cir. 1996) (holding that if there is any ambiguity about whether the district judge felt that a remand was compelled, the court of appeals must "determine by independent review of the record" what the real basis for remand was). The Seventh Circuit in this case adopted the latter approach. Under the former approach, which has also been adopted in slightly modified form by the Third and Tenth Circuits, the district court's remand order in this case would have been unreviewable. *See Balazik v. County of Dauphin*, 44 F.3d 209, 213 (3d Cir. 1995); *Archuleta v. Lacuesta*, 131 F.3d 1359, 1362 (10th Cir. 1997) (barring review as long as the district court's finding of no subject matter jurisdiction was made in good faith).

[7]Administrative Office of the United States Courts, 2004 Annual Report of the Director, Table B-4, *available at* http://www.uscourts.gov/judbus2004/appendices/b4.pdf (reporting the median time interval in all civil cases, other than prison petitions, between filing the notice of appeal and final disposition). Of course, if the defendant petitions for a writ of certiorari, the length of the appeal is further increased. This case, for example, first reached the

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district court's remand order and arguing that an exception to the "no appeal" rule applies, state court defendants compound the initial delay caused by removal by achieving an additional delay on appeal. *Amoco*, 964 F.2d at 708 ("Complex proceedings just to determine whether a remand is reviewable by the court of appeals defeat the speed and simplicity that one would have thought to be the principal justification for § 1447(d)."); *see* Solimine, *supra* note 4, at 304-05 ("The bar to review does little good if the putative reviewing authority is forced to ask in every case if the remand order is without the bounds of 'correctness.'").

In those cases in which Congress considers the availability of appellate review to be more important than the delay resulting from that review, it has created specific exceptions to the reach of § 1447(d). *See* Wasserman, *supra* note 3, at 105-07; *supra* at 6 & note 3. Section 1447(d)'s exception for appeals of remand orders in civil rights cases, for example, was based on Congress's "perception that remands of civil rights cases were particularly injurious to defendants in those cases, and that appellate exposition of Section 1443 was necessary.'" Solimine, *supra* note 4, at 293. Thus, "Congress has demonstrated its ability to protect against judicial abuses of removal rights when it thought it necessary to do so." *Thermtron*, 423 U.S. at 361 (Rehnquist, J., dissenting).

The Seventh Circuit's decision below is not unusual in its use of the *Thermtron* exception to second-guess the policy judgment of Congress. The court stressed the importance of "accurate and consistent implementation" of SLUSA and downplayed the potential for delay, noting that expedited review would be available in appropriate cases. *Kircher v. Putnam Funds Trust*, 373 F.3d 847, 850 (7th Cir. 2004). But

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[7](. .continued)
Seventh Circuit in March 2004.

the potential for inaccurate and inconsistent application of federal law is *always* a cost of denying appellate review in removal cases. This was a cost Congress was willing to pay in balancing the desirability of granting access to a federal forum against the resulting cost of delay. "It is not for this Court to strike that balance anew." *Thermtron*, 423 U.S. at 361 (Rehnquist, J., dissenting).

III. The District Court's Remand Order in this Case Falls Well Outside the Scope of the *Thermtron* Exception.

The Seventh Circuit in this case concluded it had jurisdiction to review the district court's order remanding the case for lack of subject matter jurisdiction because it disagreed with the district court's characterization of the remand. Not only is the Seventh Circuit's decision wrong as a matter of statutory interpretation, it also constitutes an impermissible second-guessing of the district court's remand order.

A. The District Court Dismissed on Grounds of Subject Matter Jurisdiction.

First, as a matter of statutory construction, the Seventh Circuit was wrong to conclude that the district court's dismissal was not jurisdictional in nature. SLUSA authorizes the removal of securities cases only in certain defined circumstances:

> Any covered class action brought in any State court involving a covered security, *as set forth in subsection (b)*, shall be removable to the Federal district court for the district in which the action is pending, and shall be subject to subsection (b).

15 U.S.C. § 77p(c) (emphasis added). The subset of cases "as set forth in subsection (b)" consists of those "covered class actions" that SLUSA preempts. Subsection (b) provides:

> No covered class action based upon the statutory or common law of any State or subdivision thereof may be maintained in any State or Federal court by any private party alleging —
>
> > (1) an untrue statement or omission of a material fact in connection with the purchase or sale of a covered security; or
> >
> > (2) that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security.

Id. § 77p(b).

Subsection (b) thus "sets forth" a defined set of covered class actions and preempts them. Subsection (c), in turn, makes these preempted class actions removable. Because a district court's removal jurisdiction under SLUSA extends only to those covered class actions that SLUSA preempts, a district court's remand of a case to state court on the grounds that SLUSA does not preempt the case is, by definition, a remand for lack of subject matter jurisdiction. "[P]reemption and the existence of subject matter jurisdiction . . . are the opposite sides of the same coin." *Spielman*, 332 F.3d at 132 (Newman, J., concurring). For this reason, the Second, Ninth, and Eleventh Circuits have held that a remand under SLUSA is jurisdictional in nature. *See Williams v. AFT Enters., Inc.*, 389 F.3d 1185 (11th Cir. 2004); *Spielman*, 332 F.3d at 125; *Abada v. Charles Schwab & Co.*, 300 F.3d 1112 (9th Cir. 2002).

Another way to think of the confluence of subject matter jurisdiction and preemption that triggers non-reviewability under § 1447(d) is to appreciate that SLUSA embodies a species of federal subject matter jurisdiction that federal courts have recognized under the "complete preemption" doctrine.

Spielman, 332 F.3d at 123 ("SLUSA was intended to completely preempt the field of *certain types* of securities class actions"); *Falkowski v. Imation Corp.*, 309 F.3d 1123, 1128 (9th Cir. 2002) ("SLUSA provides for . . . complete preemption."). When a federal statute completely preempts a state-law cause of action, a plaintiff's claim arises under federal law and is removable even if pleaded solely in terms of state law. *See Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 8 (2003). On the other hand, when, in a particular case, the district court finds that the plaintiff's claim is not completely preempted by SLUSA, that is, that the plaintiff's claim arises under state law, its ruling constitutes a finding that the court does *not* have subject matter jurisdiction. Not surprisingly, therefore, all circuits that have examined the question, other than the Seventh Circuit in its decision below, have held that a remand based on a lack of complete preemption is insulated from review under § 1447(d).[8]

B. The Seventh Circuit Impermissibly Second-Guessed the District Court's Remand Decision.

As noted earlier, the district court's remand order in *Thermtron* was granted solely on the ground that the court's docket was too crowded to permit a speedy resolution of the case. *Thermtron*, 423 U.S. at 344. Such a justification was

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[8] *Spielman*, 332 F.3d at 125; *Smith v. Texas Children's Hosp.*, 172 F.3d 923, 926 (5th Cir. 1999); *Gonzalez-Garcia v. Williamson Dickie Mfg. Co.*, 99 F.3d 490, 492 (1st Cir. 1996); *Trans Penn Wax Corp. v. McCandless*, 50 F.3d 217, 225 n.7 (3d Cir. 1995); *Nutter v. Monogahela Power Co.*, 4 F.3d 319, 321-22 (4th Cir. 1993); *Baldridge v. Kentucky-Ohio Transp., Inc.*, 983 F.2d 1341, 1345-46 (6th Cir. 1993); *Whitman v. Raley's Inc.*, 886 F.2d 1177, 1181 (9th Cir. 1989); *Glasser v. Amalgamated Workers Union Local 88*, 806 F.2d 1539, 1540 (11th Cir. 1986).

without legal basis, and "plainly irrelevant to whether the District Court would have had jurisdiction of the case had it been filed initially in that court, to the removability of a case from the state court under § 1441, and hence to the question whether this cause was removed improvidently and without jurisdiction within the meaning of the statute." *Id.* Because the district court in *Thermtron* did not even purport to dismiss the case based on subject matter jurisdiction or a defect in removal procedure, this Court had no need to second-guess the claimed basis of the district court's decision. On the contrary, the Court stressed that a district court's decision to remand for lack of subject matter jurisdiction was unreviewable on appeal "*whether erroneous or not.*" *Id.* at 343 (emphasis added); *see also Amoco*, 964 F.2d at 708 ("[E]ven an obviously erroneous invocation of § 1447(c) is untouchable.").

To rationalize its ruling, the court below disassociated SLUSA's subsection (c) analysis regarding removal from the subsection (b) requirements regarding complete preemption, holding that only the requirements of subsection (c) were jurisdictional in nature. Based on this reading of SLUSA, the court of appeals concluded that because the district court's ruling concerned preemption under subsection (b), it had appellate jurisdiction to review the district court's remand order even though the district court explicitly stated that its remand was based on lack of subject matter jurisdiction. As explained above, that analysis does not square with the statute's text. But even if this Court were to agree with the Seventh Circuit's interpretation of SLUSA, it was not *unreasonable* for the district court to believe that subsection (c)'s phrase "as set forth in subsection (b)" incorporated subsection (b)'s requirements into the criteria for removal. This interpretation of the statute, after all, has been accepted by all the courts of appeals to consider the question other than the Seventh Circuit.

If a court of appeals can second-guess a district court's purported jurisdictional dismissal here, where there are strong textual arguments in support of its position and no contrary authority in any court of appeals, many, perhaps most, district court remands could also be second-guessed on appeal. As Chief Justice Rehnquist feared, the purportedly narrow exception created in *Thermtron* would have begun to swallow § 1447(d)'s "no appeal" rule. The Court should restore the statute to its textual foundation, leaving to Congress the decision to chart a new course on the appealability of remand orders.

CONCLUSION

For the reasons stated above, the decision of the court of appeals should be vacated and remanded with instructions that the case be further remanded to the state court in which it was filed.

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IN THE

Supreme Court of the United States

CARL KIRCHER, *et al.*,

Petitioners,

v.

PUTNAM FUNDS TRUST, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF *AMICI CURIAE* OF THE SECURITIES INDUSTRY ASSOCIATION AND THE BOND MARKET ASSOCIATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the court of appeals properly exercised appellate jurisdiction to review the district court's remand order, when the remand order was the result of a substantive decision rejecting a federal statutory preemption defense to certain securities fraud class actions available under the Securities Litigation Uniform Standards Act of 1998.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	v
INTEREST OF THE *AMICI CURIAE*	1
STATUTORY PROVISIONS INVOLVED	3
INTRODUCTION AND SUMMARY OF ARGUMENT	4
ARGUMENT	5
I. A LOWER COURT'S REJECTION OF SLUSA'S PREEMPTION DEFENSE IS A REVIEWABLE MERITS RULING	5
A. The Language Of The Uniform Act Demonstrates That SLUSA Provides A Substantive Defense	6
B. Adjudications Of Substantive Defenses Are Not Subject To § 1447(d)'s Bar Of Appellate Review	7
C. *Arbaugh* v. *Y & H Corp.* Confirms That A Ruling Is Not Jurisdictional Simply Because It Addresses A Threshold, Potentially Dispositive Issue	10
II. INTERPRETATION OF REMOVAL AND APPEAL PROVISIONS SHOULD SERVE THE PURPOSE OF THE SPECIFIC SUBSTANTIVE STATUTE AT ISSUE	11
A. SLUSA Aims To Ensure That Uniform National Standards Govern Securities Fraud Litigation	12

TABLE OF CONTENTS – continued

Page

B. SLUSA's Purpose Is Undermined By Allowing Preemption Decisions That Result In Remand To Evade Appellate Review 14

C. The Lack Of Appellate Review Of Decisions Rejecting SLUSA Preemption Would Eviscerate SLUSA's Goal Of National Uniformity 17

CONCLUSION 21

TABLE OF AUTHORITIES

CASES — Page

Arbaugh v. *Y & H Corp.*, 126 S. Ct. 1235 (2006) 5, 10, 11
In re BankAmerica Corp. Sec. Litig., 263 F.3d 795 (8th Cir. 2001) 8
Burns v. *Prudential Secs., Inc.*, 116 F. Supp. 2d. 917 (N.D. Ohio 2000) 18
Breakaway Solutions, Inc. v. *Morgan Stanley & Co.*, No. CIV. A. 19522, 2004 WL 1949300 (Del. Ch. Aug. 27, 2004), *amended on other grounds*, 2005 WL 3488497 (Del. Ch. Dec. 8, 2005) 6
California Pub. Employees' Retirement Sys. v. *WorldCom, Inc.*, 368 F.3d 86 (2nd Cir. 2004), *cert. denied*, 534 U.S. 1080 (2005) 12
Cannon v. *University of Chi.*, 441 U.S. 677 (1979) 8
Carnegie-Mellon Univ. v. *Cohill*, 484 U.S. 343 (1988) 8, 9
Caterpillar v. *Williams*, 482 U.S. 386 (1987) 15
In re Cendant Corp. Litig., 264 F.3d 201 (3rd Cir. 2001) 8
Central Bank of Denver, N.A. v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994) 16
Dura Pharms., Inc. v. *Broudo*, 125 S. Ct. 1627 (2005) 2, 16
In re Enron Corp. Sec., Derivative & "ERISA" Litig., No. MDL-1446, 2002 WL 32107216 (S.D. Tex. Aug. 12, 2002) 19
Feitelberg v. *Merrill Lynch & Co.*, 234 F. Supp. 2d 1043 (N.D. Cal. 2002), *aff'd*, 353 F.3d 765 (9th Cir. 2003) 19
Gibson v. *PS Group Holdings, Inc.*, No. 00-CV-0372, 2000 WL 777818 (S.D. Cal. June 14, 2000) 19

TABLE OF AUTHORITIES – continued

Page

Gray v. *Seaboard Secs., Inc.*, 241 F. Supp. 2d 213 (N.D.N.Y. 2003), *rev'd in part on other grounds*, 126 F. App'x 14 (2d Cir. 2005) 19

Greaves v. *McAuley*, 264 F. Supp. 2d 1078 (N.D. Ga. 2003) 19

Green v. *Ameritrade, Inc.*, 120 F. Supp. 2d 795 (D.Neb. 2000), *aff'd on other grounds*, 279 F.3d 590 (8th Cir. 2002) 18

Helwig v. *Vencor, Inc.*, 251 F.3d 540 (6th Cir. 2001) 8

Howard Gunty Profit Sharing Plan v. *Greenwood*, No. 13144043, 2001 WL 1190761 (Cal. Ct. App. Oct. 5, 2001) 6

Howsam v. *Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002) 2

Jefferson County, Ala. v. *Acker*, 527 U.S. 423 (1999) 12

Kircher v. *Putnam Funds Trust*, 373 F.3d 847 (7th Cir. 2004) 4, 6, 8, 9, 20

Lampf, Pleva, Lipkind, Prupis & Petigrow v. *Gilbertson*, 501 U.S. 350 (1991) 2

Magyery v. *Transamerica Fin. Advisors, Inc.*, 315 F. Supp. 2d 954 (N.D. Ind. 2004) 18

Makor Issues & Rights, Ltd. v. *Tellabs, Inc.*, 437 F.3d 588 (7th Cir. 2006) 8

Merrill Lynch, Pierce, Fenner & Smith, Inc. v. *Dabit*, No. 04-1371, 2006 WL 694137 (U.S. Mar. 21, 2006) ..... *passim*

Quackenbush v. *Allstate Ins. Co.*, 517 U.S. 706 (1996) 7, 9

Robbins v. *Koger Props., Inc.*, 116 F.3d 1441 (11th Cir. 1997) 8

Rodriguez De Quijas v. *Shearson/Amer. Express, Inc.*, 490 U.S. 477 (1989) 2

TABLE OF AUTHORITIES – continued

Page

Shackelford v. *Ohio Nat'l Life Ins. Co.*, No. D043503, 2004 WL 2074411 (Cal. Ct. App. Sept. 16, 2004) 6

Shaw v. *Charles Schwab & Co.*, 128 F. Supp. 2d 1270 (C.D. Cal. 2001) 18

Shearson/Amer. Express, Inc. v. *McMahon*, 482 U.S. 220 (1987) 2

Tennessee v. *Davis*, 100 U.S. 257 (1879) 10

Thermtron Prods., Inc. v. *Hermansdorfer*, 423 U.S. 336 (1976), *abrogated in part on other grounds by Quackenbush* v. *Allstate Ins. Co.*, 517 U.S. 706 (1996) 4, 7, 9

Things Remembered, Inc. v. *Petrarca*, 516 U.S. 124 (1995) 9

Winne v. *Equitable Life Assur. Soc'y of the United States*, 315 F. Supp. 2d 404 (S.D.N.Y. 2003) 18

In re WorldCom, Inc. Secs. Litig., 308 F. Supp. 2d 236 (S.D.N.Y. 2004) 18

STATUTES

Securities Act of 1933, ch. 38, 48 Stat. 74 (codified as amended at 15 U.S.C. § 77v) 11

Securities Exchange Act of 1934, ch. 404, 48 Stat. 881 (codified as amended at 15 U.S.C. § 78aa) 11

Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 13

Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, 112 Stat. 3227 .... 2, 13, 14

Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (to be codified at 28 U.S.C. § 1453(c)(1)) 9

15 U.S.C. § 77p ..... *passim*

TABLE OF AUTHORITIES – continued

Page

15 U.S.C. § 77z-1(a)(3) 15
§ 78u-4 15
§ 78bb(f) 3, 6, 8, 15, 16
28 U.S.C. § 1291 7
§ 1442 12
§ 1447 ..... 3, 4, 7

LEGISLATIVE HISTORY

Oversight Hearing on Securities Litigation Abuses Concerning S. 1260, The Securities Litigation Uniform Standards Act of 1997, Before the Subcomm. on Sec. of the S. Comm. on Banking, Hous., and Urban Affairs, 105th Cong. (1997) 13, 17
S. Rep. No. 104-98 (1995) 16
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TABLE OF AUTHORITIES – continued

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INTEREST OF THE *AMICI CURIAE*[1]

The Securities Industry Association ("SIA") brings together the shared interests of approximately 600 securities firms to accomplish common goals. SIA's primary mission is to build and maintain public trust and confidence in the securities markets. SIA members (including investment banks, broker-dealers, and mutual fund companies) are active in all U.S. and foreign markets and in all phases of corporate and public finance. According to the Bureau of Labor Statistics, the U.S. securities industry employs nearly 800,000 individuals, and its personnel manage the accounts of nearly 93 million investors directly and indirectly through corporate, thrift, and pension plans. In 2004, the industry generated $236.7 billion in domestic revenue and an estimated $340 billion in global revenues. (More information about SIA is available at www.sia.com.)

The Bond Market Association ("TBMA") represents approximately 200 securities firms, banks, and asset managers that underwrite, sell, trade, and invest in debt securities and other credit products in the United States and in international markets. Its members include securities dealers and brokers that are large multi-product firms and those with special market niches, as well as asset management firms with over $9 trillion under management. From its inception in 1976, TBMA has worked with its member firms, Congress, the Securities Exchange Commission, the Federal Reserve Board, the Federal Reserve Bank of New York, state regulators, and self-regulatory organizations to foster effective, efficient regulation; to enhance the liquidity and

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[1] Pursuant to this Court's Rule 37.6, *amici* SIA and TBMA state that no counsel for any party authored this brief in whole or in part, and no person or entity other than *amici* and their members made a monetary contribution to the preparation or submission of the brief. Counsel of record for both parties have consented to the filing of this brief, and the letters of consent have been filed with the Clerk.

efficiency of the markets for debt and credit products; to encourage sound credit and business practices for participants in such markets; and to promote the highest levels of professional standards and conduct in such markets. (More information about TBMA is available at www.bondmarkets.com.)

The SIA and/or TBMA have previously filed *amici* briefs with the Court in cases affecting civil liability and the federal securities laws. See, *e.g.*, *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Dabit*, No. 04-1371, 2006 WL 694137 (U.S. Mar. 21, 2006); *Dura Pharms., Inc.* v. *Broudo*, 125 S. Ct. 1627 (2005); *Howsam* v. *Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002); *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U.S. 350 (1991); *Rodriguez De Quijas* v. *Shearson/Amer. Express, Inc.*, 490 U.S. 477 (1989); *Shearson/Amer. Express, Inc.* v. *McMahon*, 482 U.S. 220 (1987).

The issue raised by this case is whether the courts of appeals have the authority to review district courts' interpretations of the various questions of federal law that arise in determining whether the preemption defense of the Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, sec. 101, § 16, 112 Stat. 3227, 3227-33, ("SLUSA" or "Uniform Act") is applicable. This issue is one of great import to the securities industry and investors in this era of proliferating securities litigation. It is critically important to the SIA and TBMA that the effort of Congress to curb vexatious securities litigation by enacting the uniform national requirements of SLUSA not fall prey to plaintiffs who attempt creatively to avoid SLUSA preemption. Uniform standards are critical to the use of U.S. securities markets by both domestic and foreign issuers. Such national uniformity requires that the substantive issues of federal law that arise in determining whether the elements of the SLUSA preemption defense are satisfied be subject to appellate review. *Amici* therefore have a vital interest in the issue

presented in this case, and their views and experience can assist the Court in resolving that issue.

STATUTORY PROVISIONS INVOLVED

Securities Litigation Uniform Standards Act:

> No covered class action based upon the statutory or common law of any State or subdivision thereof may be maintained in any State or Federal court by any private party alleging – (A) a misrepresentation or omission of a material fact in connection with the purchase or sale of a covered security; or (B) that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security.

15 U.S.C. § 78bb(f)(1); *accord id.* § 77p(b).

> Any covered class action brought in any State court involving a covered security, as set forth in paragraph (1) of this section, shall be removable to the Federal district court for the district in which the action is pending, and shall be subject to paragraph (1).

15 U.S.C. § 78bb(f)(2); *accord id.* § 77p(c).

General Federal Remand Statute:

> A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal . . . . If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.

28 U.S.C. §1447(c).

> An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court

> from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

28 U.S.C. § 1447(d).

INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents the question whether the courts of appeals may review a district court's adjudication of a substantive question of federal law – whether the federal defense of SLUSA preemption applies – when the result of that adjudication is to remand a removed securities law class action to State court.

At issue is whether a substantive ruling deciding the merits of a federal defense by a district court, indisputably vested with subject matter jurisdiction by Congress to decide exactly that issue, should receive federal appellate review in consonance with SLUSA's purpose of guaranteeing uniform national standards. As set forth below, a ruling on the merits of the SLUSA preemption defense is not a determination of the district court's subject matter jurisdiction reached before and divorced from the substantive merits. Rather, a determination by a district court that the federal defense of SLUSA preemption is not applicable is a substantive adjudication by that court of the elements of a federal substantive defense. Thus, remand determinations based on such substantive rulings are premised on neither jurisdictional nor procedural grounds, and therefore are not barred from appellate review under the general remand statute, 28 U.S.C. § 1447(d). See, *e.g.*, *Thermtron Prods., Inc.* v. *Hermansdorfer*, 423 U.S. 336, 345 (1976).

Moreover, the Seventh Circuit correctly noted that if remands of SLUSA claims are deemed non-appealable, "major substantive issue[s] . . . will escape review." *Kircher* v. *Putnam Funds Trust*, 373 F.3d 847, 850 (7th Cir. 2004). For example, if the Seventh Circuit had declined to exercise appellate review over a SLUSA-based remand in *Kircher*, it is

unlikely that the vital *Dabit* issue – whether SLUSA preempts holder class actions – would have been decided by this Court because there would have been no conflict in the circuits. *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Dabit*, No. 04-1371, 2006 WL 694137 (U.S. Mar. 21, 2006). Failure to provide federal appellate review to SLUSA remands based on rejection of the preemption defense will result in the balkanization of federal law governing the scope and meaning of the preemption defense to securities actions provided by SLUSA. This would badly undermine the statute's promise of providing "uniform standards" to govern national securities fraud class actions.

ARGUMENT

I. A LOWER COURT'S REJECTION OF SLUSA'S PREEMPTION DEFENSE IS A REVIEWABLE MERITS RULING.

The propriety of appellate review follows from three basic points. *First*, the text of the Uniform Act demonstrates that SLUSA provides a substantive federal defense to covered class actions. A determination that the SLUSA preemption defense applies is therefore a substantive adjudication of the merits that fully disposes of the covered state law class claims. *Second*, such final merits determinations are subject to appellate review. Section 1447(d), read *in pāri materia* with section 1447(c), poses no bar to appellate review of adjudications of a substantive federal defense. *Third*, this Court's recent decision in *Arbaugh* v. *Y & H Corp.*, 126 S. Ct. 1235 (2006), confirms that a ruling is not properly classified as jurisdictional merely because it addresses a threshold, potentially dispositive issue.

A. The Language Of The Uniform Act Demonstrates That SLUSA Provides A Substantive Defense.

The language of the statute makes clear that SLUSA preemption is a federal defense to securities fraud class actions – not a jurisdictional provision. As the Seventh Circuit observed in the decision below, "a federal judge is not only authorized but also required to decide whether *any* court may entertain the litigation" when a SLUSA defense is presented. *Kircher*, 373 F.3d at 849 (emphasis added). The language of the statute is clear that this preemption defense is applicable in *both* federal and state court: "No covered class action . . . may be maintained in any *State or Federal* court." 15 U.S.C. § 78bb(f)(1) (emphasis added); *accord id.* § 77p(b).

Petitioners themselves effectively acknowledge that SLUSA preemption is a merits issue, going to the elements of a substantive defense, and not a jurisdictional issue as to which forum should hear the issue. They do so by conceding that, absent removal, the exact same preemption defense still applies in state court. See Pet. Br. at 47. Indeed, state courts must adjudicate the merits of the SLUSA preemption defense in instances when the removal provision is not invoked. See, *e.g.*, *Shackelford* v. *Ohio Nat'l Life. Ins. Co.*, No. D043503, 2004 WL 2074411 (Cal. Ct. App. Sept. 16, 2004); *Howard Gunty Profit Sharing Plan* v. *Greenwood*, No. B144043, 2001 WL 1190761 (Cal. Ct. App. Oct. 5, 2001); *Breakaway Solutions, Inc.* v. *Morgan Stanley & Co.*, No. Civ. A. 19522, 2004 WL 1949300 (Del. Ch. Aug. 27, 2004), *amended on other grounds*, 2005 WL 3488497 (Del. Ch. Dec. 8, 2005).

If an adjudication of the SLUSA preemption defense were purely a matter of federal subject matter jurisdiction, SLUSA preemption would not be a substantive defense presentable in state court. State courts generally do not adjudicate questions that are properly characterized as issues of strictly federal subject matter jurisdiction. For example, if there is diversity between a plaintiff and a defendant, but the defendant does

not remove, the state court will not address that issue. In contrast, state courts must address SLUSA preemption when a defendant does not remove because it is a substantive defense. Accordingly a federal district court decision that a class action is not preempted by SLUSA is also a substantive adjudication of the federal preemption defense.

This is also basic common sense. In a typical federal case, a ruling that a federal court has subject matter jurisdiction does not dispose of, indeed has no effect on, the substantive claims. For example, a ruling that a court has diversity jurisdiction does nothing to address, much less dispose of, the underlying state law claims. In contrast, a ruling that SLUSA preemption applies requires final dismissal of the state law class action claims and those claims cannot be reasserted as part of a "covered class action" in any federal or state court. That is a quintessential decision on the merits. Final decisions on the merits are classically reviewable on appeal. See 28 U.S.C. § 1291.

B. Adjudications Of Substantive Defenses Are Not Subject To § 1447(d)'s Bar Of Appellate Review.

28 U.S.C. § 1447(d) states: "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise." 28 U.S.C. § 1447(d). Because § 1447(d) must be read in conjunction with § 1447(c), appellate review of remand orders is prohibited only where the district court remands because it lacks subject matter jurisdiction at the time of removal, or due to a procedural defect in the removal process itself. *Thermtron Prods.*, 423 U.S. at 345.[2] Here, the district court did not lack subject

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[2] The essence of the argument made by *Amici Curiae* in Support of Petitioners, Law Professors Arthur R. Miller et al., is that the Court should effectively overrule *Thermtron*. This argument is made notwithstanding this Court's application of the *Thermtron* exception in later cases, including its endorsement and application by a unanimous Court in *Quackenbush* v. *Allstate Insurance Co.*, 517 U.S. 706 (1996).

matter jurisdiction at the time of removal. To the contrary, SLUSA's removal provision explicitly vests the federal courts with the authority to determine the substantive merits of the Uniform Act's federal preemption defense. 15 U.S.C. § 78bb(f)(2); *accord id.* § 77p(c). *Supra*, at 14-17.

The Seventh Circuit correctly characterized SLUSA remands based on the rejection of the preemption defense to be the result of substantive determinations by the district court that "come[] at the end rather than the outset of federal adjudication." *Kircher*, 373 F.3d at 848. Accordingly, the appeals court properly held that § 1447(d), read *in pari materia* with § 1447(c), posed no bar to appellate review of SLUSA remand decisions based on rejection of the preemption defense, because such remands do not result from a lack of subject matter jurisdiction, or a defect in the removal

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The Court has not granted certiorari on this issue, nor has briefing been requested. Moreover, Congress, when enacting SLUSA, was entitled to rely on the teachings of *Thermtron*, *Quackenbush*, and *Carnegie-Mellon University* v. *Cohill*, 484 U.S. 343 (1988), that remand determinations based on non-jurisdictional grounds were reviewable on appeal. *See Cannon* v. *University of Chi.*, 441 U.S. 677, 696-98 (1979) (applying implied right of action standard in place when the statute was enacted). Indeed, assuming for the sake of argument, that this Court were nonetheless to choose to limit *Thermtron* to its facts, and rule that remand determinations based on *substantive* grounds beyond the specific jurisdictional and procedural grounds set forth in 1447(c) could not be appealed, such a ruling should apply only prospectively to actions under new statutes, and not serve as a bar to appellate review of remands based on rejection of SLUSA preemption.

We also note that in addition to the description of Professor Miller's academic interests and treatise cited in his *amici* brief, Professor Miller also frequently serves as co-counsel to some of the nation's largest plaintiffs' class action firms in securities litigation. *See, e.g., Makor Issues & Rights, Ltd.* v. *Tellabs, Inc.*, 437 F.3d 588 (7th Cir. 2006); *In re Cendant Corp. Litig.*, 264 F.3d 201 (3rd Cir. 2001); *In re BankAmerica Corp. Sec. Litig.*, 263 F.3d 795 (8th Cir. 2001); *Helwig* v. *Vencor, Inc.*, 251 F.3d 540 (6th Cir. 2001) (en banc); *Robbins* v. *Koger Props., Inc.*, 116 F.3d 1441 (11th Cir. 1997).

process, but rather from a substantive rejection of the federal defense. *Id.* at 848-49.[3]

The decision of the Seventh Circuit was consistent with this Court's precedent holding that appellate review of remand orders is barred only for those grounds specified in § 1447(c). See, *e.g.*, *Quackenbush* v. *Allstate Ins. Co.*, 517 U.S. 706, 711-12 (1996) (§ 1447(d) did not bar review of remand based on *Burfurd* abstention); *Carnegie-Mellon Univ.* v. *Cohill*, 484 U.S. 343, 347-48 (1988) (discretionary remand of remaining pendent state law claim after federal claim dismissed is reviewable on appeal); *Thermtron Prods.*, 423 U.S. at 351 (remand order based on district court's congested docket reviewable on appeal because it was not a ground for remand specified in § 1447(c)). "*[O]nly* remands based on grounds specified in § 1447(c) are immune from review under § 1447(d)." *Things Remembered, Inc.* v. *Petrarca*, 516 U.S. 124, 127 (1995) (emphasis added). Section 1447(c) does not specify that district courts must remand actions upon the rejection of a federal preemption defense. Accordingly, § 1447(d) poses no bar to appellate review of SLUSA-based remand determinations made on that basis.[4]

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[3] This does not mean that remands in SLUSA cases would necessarily be appealable when the basis for remand was something other than rejection of the SLUSA preemption defense. For example, the remand of a SLUSA-removed case because of the defect that removal was untimely under the 30-day rule would be unreviewable under § 1447(d).

[4] Petitioners argue that the provision of the Class Action Fairness Act ("CAFA"), which specifically authorizes "an appeal from an order of a district court granting or denying a motion to remand a class action to the State court." Pub. L. No. 109-2, § 5(a), 119 Stat. 4, 12 (2005) (to be codified at 28 U.S.C. § 1453(c)(1)), demonstrates that appellate review of SLUSA-based remands is prohibited because SLUSA does not have such a provision. To the contrary, SLUSA does not contain a specific provision authorizing appellate review of SLUSA-based remands because none is required. Remand determinations under SLUSA such as this case are based on substantive adjudications of the merits of the federal defense and were thus appealable under *Thermtron's* controlling, and twice reaffirmed,

C. *Arbaugh* v. *Y & H Corp.* Confirms That A Ruling Is Not Jurisdictional Simply Because It Addresses A Threshold, Potentially Dispositive Issue.

This Court's recent decision in *Arbaugh* v. *Y & H Corp.*, 126 S. Ct. 1235 (2006), confirms that it is error to classify a merits ruling as jurisdictional simply because it addresses a threshold issue that could dispose of the case. *Arbaugh* involved "the distinction between two sometimes confused or conflated concepts: federal-court 'subject-matter' jurisdiction over a controversy; and the essential ingredients of a federal claim for relief."[5] *Id.* at 1238. There the context was whether, following a jury verdict, a Title VII claim was properly dismissed for a newly-raised issue of lack of subject matter jurisdiction. The Court held that the employee-numerosity requirement of Title VII, although a threshold and potentially dispositive issue, related to the "substantive adequacy of Arbaugh's Title VII claim," and as such did "not circumscribe federal-court subject-matter jurisdiction." *Id.*

Arbaugh teaches that the term jurisdiction is not properly invoked to describe all threshold, potentially dispositive rulings. It correctly rejects the category of "drive-by

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interpretation of § 1447(d) when SLUSA was enacted in 1998. In contrast, CAFA requires an express provision to overcome § 1447(d)'s bar of appellate review because remands under CAFA are made on the basis of purely procedural and jurisdictional grounds, which fall within the ambit of § 1447(c), and thus would not be appealable under *Thermtron*.

[5] That the substantive elements at issue here are pertinent to a defense does not negate the fact that the district court, in determining the applicability of SLUSA, adjudicates the substantive merits of a claim for relief. *See Tennessee* v. *Davis*, 100 U.S. 257, 264 (1879) ("A case consists of the right of one party as well as the other, and may truly be said to arise under the Constitution or a law or a treaty of the United States whenever its correct decision depends upon the construction of either. Cases arising under the laws of the United States are such as grow out of the legislation of Congress, whether they constitute the right or privilege, or claim of protection, *or defence of the party*, in whole or in part, by whom they are asserted.") (emphasis added).

jurisdictional rulings" in which courts label threshold merits dismissals as based on "lack of jurisdiction." *Id.* at 1242.

Indeed, if the SLUSA preemption determination by the district court were ruled to be a matter of jurisdiction, it is foreseeable that a situation analogous to that presented in *Arbaugh* would arise. Imagine that a securities fraud class action comprising a mix of claims from the Securities Act of 1933 and state law claims was removed from state court to federal court under SLUSA.[6] Thereafter, the plaintiffs do not challenge removal or preemption, litigate their federal claims, and lose. If a successful SLUSA preemption defense is jurisdictional, plaintiffs could, at that late stage in the litigation, assert that the state claims were improperly preempted and that the entire case should accordingly be remanded to state court for lack of jurisdiction. Indeed, under Petitioners' interpretation of 28 U.S.C. § 1447(d), that end-of-the-case remand would not be appealable. Interpreting SLUSA preemption to be jurisdictional would thus enable class action plaintiffs to game the system, and would result in "unfairness and waste of judicial resources," *id.* at 1245, exactly what *Arbaugh* holds is improper.

II. INTERPRETATION OF REMOVAL AND APPEAL PROVISIONS SHOULD SERVE THE PURPOSE OF THE SPECIFIC SUBSTANTIVE STATUTE AT ISSUE.

Statutory provisions relating to removal should be construed to serve the purposes of the underlying statute, here

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[6] Absent SLUSA, 1933 Act claims are not removable. Securities Act of 1933, ch. 38, § 22, 48 Stat. 74, 86-87 (codified as amended at 15 U.S.C. § 77v); *see also* Jordan A. Costa, *Removal of Securities Act of 1933 Claims After SLUSA: What Congress Changed, and What It Left Alone*, 78 St. John's L. Rev. 1193 (2004). Federal courts have exclusive jurisdiction over civil suits arising under the Securities Exchange Act of 1934, ch. 404, § 27, 48 Stat. 881, 902-03 (codified as amended at 15 U.S.C. § 78aa). Accordingly, when securities plaintiffs sue in state court, they often combine 1933 Act and state law claims.

SLUSA. The interpretation afforded by this Court to the federal officer removal statute, 28 U.S.C. § 1442, is illustrative. Under that statute, suits against federal officers may be removed if a "colorable federal defense" is raised, and like the provision allowing for removal under SLUSA, "despite the nonfederal cast of the complaint; the federal-question is met if the defense depends on federal law." *Jefferson County, Ala.* v. *Acker*, 527 U.S. 423, 431 (1999). In construing the colorable federal defense requirement, this Court has "rejected a 'narrow, grudging interpretation' of the statute, recognizing that 'one of the most important reasons for removal is to have the validity of the defense of official immunity tried in a federal court.'" *Id.* at 431 (quoting *Willingham* v. *Morgan*, 395 U.S. 402, 407 (1969)). Cf. *California Pub. Employees' Retirement Sys.* v. *WorldCom, Inc.* 368 F.3d 86, 103-04 (2nd Cir. 2004) ("[I]n its every detail, Section 1452(a) [the bankruptcy removal statute] is designed to further Congress's purpose of centralizing bankruptcy litigation in a federal forum."), *cert. denied*, 534 U.S. 1080 (2005).

Similarly, the SLUSA removal provision reflects Congress's intent that the merits of the federal preemption defense available under SLUSA be evaluated by the federal courts. SLUSA's purpose of promoting uniformity of national standards to govern securities fraud litigation is furthered by providing federal appellate review to all district court adjudications of SLUSA preemption, and not only to pro-preemption rulings that result in dismissal of the claim.

A. SLUSA Aims To Ensure That Uniform National Standards Govern Securities Fraud Litigation.

"The magnitude of the federal interest in protecting the integrity and efficient operation of the market for nationally traded securities cannot be overstated." *Merrill Lynch*, No. 04-1371, 2006 WL 694137, at *4. As apparent from its very title, the purpose of SLUSA is to achieve national "uniform standards" for "securities litigation." SLUSA makes the

federal antifraud provisions for securities litigation, which are governed by the Private Securities Litigation Reform Act of 1995 (Reform Act or PSLRA),[7] the exclusive national standard for most securities fraud class actions.

In passing the Uniform Act, Congress paid heed to testimony that "[n]ational [securities] markets should . . . be governed by national standards." *Oversight Hearing on Securities Litigation Abuses Concerning S. 1260, The Securities Litigation Uniform Standards Act of 1997, Before the Subcomm. on Sec. of the S. Comm. on Banking, Hous., and Urban Affairs*, 105th Cong. 67 (1997). "If individual States are permitted to assert individual jurisdiction over transactions in national markets, the predictable result is chaos and mayhem." *Id.* at 79. SLUSA sought to protect businesses from exposure to litigation in each of the fifty states under fifty different procedural and substantive standards when such litigation could arise in the event of a single allegation of fraud in connection with the purchase or sale of a nationally traded security.

In particular, SLUSA's legislative history indicates that as foreign securities markets grow, this makes it increasingly important to ensure uniformity and certainty in the U.S. securities markets. 143 Cong. Rec. S10475, S10477 (daily ed. Oct. 7, 1997), *available at* 1997 WL 614735 ("[I]f our markets are to remain ahead of those in London, Frankfurt, Tokyo or Hong Kong, we must create uniformity and certainty."). See also *id.* ("How can we expect to get foreign companies to list on our exchanges if we have to explain that they will face not only our very tough Federal standards on securities fraud, but also the possibility of 50 constantly changing State standards").

Congress explained the reasons behind the enactment of SLUSA in § 2 of the statute. Pub. L. No. 105-353, § 2, 112

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[7] Pub. L. No. 104-67, 109 Stat. 737 (1995) (codified as amended in scattered sections of 15 U.S.C.)

Stat. at 3227. Specifically, Congress found, *inter alia*, that "since enactment of [PSLRA], considerable evidence has been presented to Congress that a number of securities class action lawsuits have shifted from Federal to State Courts," *id.* § 2(2), 112 Stat. at 3227; "this shift has prevented [PSLRA] from fully achieving its objectives," *id.* § 2(3), 112 Stat. at 3227; and that

> in order to prevent certain State private securities class action lawsuits alleging fraud from being used to frustrate the objectives of [PSLRA], it is appropriate to enact *national* standards for securities class action lawsuits involving nationally traded securities, while preserving the appropriate enforcement powers of State securities regulators and not changing the current treatment of individual lawsuits.

Id. § 2(5), 112 Stat. at 3227 (emphasis added).

The Uniform Act aimed to "prevent plaintiffs from seeking to evade the protections that Federal law provides against abusive litigation by filing suit in the State court, rather than Federal, court." H.R. Rep. No. 105-803, at 13 (1998) (Conf. Rep.) The legislation was

> designed to protect the interests of shareholders and employees of public companies that are the target of meritless "strike" suits [the purpose of which] is to extract a sizeable settlement from companies that are forced to settle, regardless of the lack of merits of the suit, simply to avoid the potentially bankrupting expense of litigating.

Id.

B. SLUSA's Purpose Is Undermined By Allowing Preemption Decisions That Result In Remand To Evade Appellate Review.

SLUSA guarantees that uniform national standards govern national securities litigation by making federal courts,

applying federal law, the exclusive venue for certain securities class actions. 15 U.S.C. § 78bb(f)(1); *accord id.* § 77p(b). Thus, for "covered class actions"[8] that fall within the scope of SLUSA's preemption provision, the sole remedy available for investors is a federal securities fraud action, where plaintiffs must comply with the heightened pleading standards and other procedural safeguards provided by PSLRA.[9]

Congress reinforced SLUSA's guarantee of uniformity for securities litigation by including a statute-specific removal provision that vests federal courts with the authority to make the substantive determinations required to establish SLUSA's preemption defense. 15 U.S.C. § 78bb(f)(2); *accord id.* § 77p(c). SLUSA's removal provision effectively serves as a statutory exception to the well-pleaded complaint rule, which would otherwise preclude removal to federal court of a state law claim when the only basis for removal was assertion of a federal defense. See *Caterpillar* v. *Williams*, 482 U.S. 386, 392 (1987). By providing for removal of securities class actions, Congress plainly sought to ensure that *federal* courts

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[8] A "covered class action" is defined as a lawsuit "in which . . . damages are sought on behalf of more than 50 persons or prospective class members," 15 U.S.C. § 77p(f)(2)(A)(i)(I); or where "one or more named parties seek to recover damages on a representative basis on behalf of themselves and other unnamed parties similarly situated," *id.* § 77p(f)(2)(A)(i)(II); or "any group of lawsuits filed or pending in the same court and involving common questions of law or fact in which (I) damages are sought on behalf of more than 50 persons; and (II) the lawsuits are joined, consolidated, or otherwise proceed as a single action for any purpose, *id.* § 77p(f)(2)(A)(ii).

[9] For example, under the Reform Act's heightened pleading standards, plaintiffs are required to "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." 15 U.S.C. § 78u-4(b)(2). PSLRA also provides for an automatic stay of discovery upon the filing of a motion to dismiss. *Id.* § 78u-4(a)(3); *accord id.* § 77z-1(a)(3).

would develop the precedent on the scope of SLUSA's preemption defense.

It would be contrary to Congress's plan to bar appellate review of district court preemption determinations under SLUSA only where the district court *rejects* preemption and permits state law claims to go forward. To disallow appellate review only for district court decisions that permit state law claims increases the likelihood of the very balkanization of securities law standards that SLUSA is designed to prevent.

It further disserves the substantive uniformity that SLUSA promotes to have a lopsided system where: (a) decisions favoring preemption are immediately reviewed by a federal court of appeals, but (b) decisions rejecting preemption will usually never be subject to appellate review because the vast majority of remanded cases will settle in the state trial courts regardless of their legal merits.[10] Such a lopsided system

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[10] This Court has repeatedly noted its concern of the effect on securities markets of settlements that are disproportionate to the legal merits of the claim. *See, e.g., Merrill Lynch*, No. 04-1371, 2006 WL 694137, at *5; *Dura Pharms.* v. *Broudo*, 125 S.Ct. 1627, 1634 (2005); *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 189 (1994). As Congress recognized when designing the PSLRA: "If a defendant cannot win an early dismissal of the case, the economics of litigation may dictate a settlement even if the defendant is relatively confident that it would prevail at trial." S. Rep. No. 104-98, at 7 (1995) (internal quotation marks omitted); *see also* J. Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 Stan. L. Rev. 497, 578 (1991) ("virtually all cases are settled"). Senator Phil Gramm described the situation prior to the passage of SLUSA:

> [W]e were able to pass a piece of legislation [PSLRA] aimed at doing something about this problem. We have had many companies, especially new growth companies, plagued with abusive lawsuits, often being forced to settle out of court because of the high costs of proving innocence. We had a system of parasites who were literally bleeding the life blood out of growth companies in America . . . .
>
> . . . .

would thwart SLUSA's central purpose by "evad[ing] the protections that Federal law provides against abusive litigation by filing suit in the State court, rather than Federal court." H.R. Rep. No. 105-803, at 13.

C. The Lack Of Appellate Review Of Decisions Rejecting SLUSA Preemption Would Eviscerate SLUSA's Goal Of National Uniformity.

Failure to exercise appellate review over SLUSA-based remand determinations has already resulted in a proliferation of unreviewed, and often conflicting, district court decisions. This fragmentation of the case law and the absence of any controlling precedent eviscerates the "uniform" federal defense to securities fraud class actions that is promised by SLUSA.

Except for the Seventh Circuit's decision to exercise appellate review over a SLUSA-based remand in *Kircher*, and the resulting creation of a conflict between the Second and Seventh Circuits, it is unlikely that the important *Dabit* issue – whether SLUSA preempts holder class actions – would ever have come to the Court's attention. *Merrill Lynch*, No. 04-1371, 2006 WL 694137, at *2. The *Dabit* issue is but one of many substantive questions of federal law that are being adjudicated across the country as district courts

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> . . . We discovered . . . that a new loophole was being exploited, that what was occurring is that there has been a shift of these lawsuits into State courts.

Oversight Hearing on Securities Litigation Abuses Concerning S. 1260, The Securities Litigation Uniform Standards Act of 1997, Before the Subcomm. on Sec. of the S. Comm. on Banking, Hous., and Urban Affairs, 105th Cong. 1-2 (1997) (statement of Senator Phil Gramm). In short, SLUSA was

> designed to protect the interests of shareholders and employees of public companies that are the target of meritless "strike" suits [the purpose of which] is to extract a sizeable settlement from companies that are forced to settle, regardless of the lack of merits of the suit, simply to avoid the potentially bankrupting expense of litigating.

H.R. Rep. No. 105-803, at 13.

exercise their jurisdiction in determining whether the elements of the federal defense provided by SLUSA are satisfied. If the courts of appeals could not review district court rejections of SLUSA's preemption defense, the statute's goals of uniformity and consistency in the application of federal securities law would never be realized.

As one district court judge has lamented, "the district court cases appear to be all over the map on the issue of what state law claims are preempted by SLUSA." *Magyery* v. *Transamerica Fin. Advisors, Inc.*, 315 F. Supp. 2d 954, 959 (N.D. Ind. 2004). At issue in *Magyery* was whether SLUSA-preemption requires a state law complaint to allege that the defendants made a misrepresentation or omission of material fact with scienter. The court chronicled the "clear split among the courts on the issue of whether the . . . claims must allege 'scienter' for SLUSA preemption to apply." *Id.* at 959-60 (comparing *Burns* v. *Prudential Secs., Inc.*, 116 F. Supp. 2d 917 (N.D. Ohio 2000) (requiring scienter), and *Green* v. *Ameritrade, Inc.*, 120 F. Supp. 2d 795, 798 (D. Neb. 2000) (same), *aff'd on other grounds*, 279 F.3d 590 (8th Cir. 2002), and *Shaw* v. *Charles Schwab & Co.*, 128 F. Supp. 2d 1270, 1272-73 (C.D. Cal. 2001) (same), with *Winne* v. *Equitable Life Assur. Soc'y of the United States*, 315 F. Supp. 2d 404, 413-15 (S.D.N.Y. 2003) (SLUSA preemption does not require scienter)).

The district courts are similarly struggling with other substantive issues that arise in defining the "national standards for securities class action lawsuits involving nationally traded securities" promised by SLUSA. H.R. Rep. No. 105-803, at 2. Such issues include, *inter alia*:

1) How to arrive at the "50 persons" total for the purposes of establishing a "covered class action" under 15 U.S.C. § 77p(f)(2)(A)(ii). Compare *In re WorldCom, Inc. Securities Litigation*, 308 F. Supp. 2d 236, 246 (S.D.N.Y. 2004) (holding ten individual actions collectively brought on behalf of more than 50 persons that were subsequently consolidated

in federal court, and containing the same claims constituted a "group of lawsuits" and was therefore a "covered class action" and noting that the absence of any indication in SLUSA that the joined actions be pending in the same *state* court), with *In re Enron Corp. Sec., Derivative & "ERISA" Litig.*, No. MDL-1446, 2002 WL 32107216, at *5 (S.D. Tex. Aug. 12, 2002) (holding that conditions for SLUSA preemption, including consolidation of actions, must exist at time of removal from state court);

2) Whether SLUSA's definition of a "covered class action" encompasses state law actions seeking equitable relief, rather than traditional damages. See, *e.g.*, *Feitelberg* v. *Merrill Lynch & Co.*, 234 F. Supp. 2d 1043 (N.D. Cal. 2002) (holding that restitution and disgorgement damages sought under state law qualify as monetary damages for purposes of SLUSA removal), *aff'd*, 353 F.3d 765 (9th Cir. 2003) (per curiam); *Gibson* v. *PS Group Holdings, Inc.*, No. 00-CV-0372, 2000 WL 777818 (S.D. Cal. June 14, 2000) (holding that class action plaintiff may not defeat removal by omitting a prayer for damages);

3) How the Uniform Act's preemption defense should apply to complaints that include a mixture of preempted and non-preempted claims. Compare *Greaves* v. *McAuley*, 264 F. Supp. 2d 1078 (N.D. Ga. 2003) (holding that because certain claims were excepted from SLUSA preemption under the "Delaware carve-out," 15 U.S.C. § 77p(d)(4), entire action should be remanded), with *Gray* v. *Seaboard Secs., Inc.*, 241 F. Supp. 2d 213, 219-20 (N.D.N.Y. 2003) (determining SLUSA preemption as to each separate claim), *rev'd in part on other grounds*, 126 F. App'x 14 (2nd Cir. 2005); and

4) How strictly to read complaints in determining whether the elements of the SLUSA preemption defense are satisfied – in particular, whether or not district courts should limit themselves to assessing allegations made on the face of the complaint and, relatedly, the extent to which plaintiffs should be allowed to plead around the elements of the SLUSA

preemption defense. See generally Jennifer O'Hare, *Preemption Under the Securities Litigation Uniform Standards Act: If It Looks Like a Securities Fraud Claim and Acts Like a Securities Fraud Claim, Is It a Securities Fraud Claim?*, 56 Ala. L. Rev. 325, 348-68 (2004) (surveying conflicting case law).

This list is only illustrative of the myriad questions of federal law, beyond the *Dabit* issue, that arise in district courts as they contend with the merits and scope of SLUSA's federal preemption defense. Indeed, Petitioners themselves devote several pages of their brief to chronicling various substantive issues regarding SLUSA preemption, beyond the issue this Court has now addressed in *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Dabit*, No. 04-1371, 2006 WL 694137 (U.S. Mar. 21, 1006). See Pet. Br. at 42-45.

It is therefore clear that absent appellate review of district court rejections of SLUSA preemption, SLUSA's promise of uniformity will prove to be merely illusory. In promulgating the Uniform Act, Congress surely did not intend to allow erroneous district court interpretations of the reach of purportedly uniform national standards to remain uncorrected. Nor did Congress intend for federal appellate courts to be hamstrung in their role of resolving conflicts between differing district court interpretations of the scope of the SLUSA preemption defense. But these will be exactly the outcomes of a failure to allow appellate review of SLUSA-based remands. If rejections of SLUSA preemption are deemed non-appealable, then "major substantive issue[s] . . . will escape review." *Kircher*, 373 F.3d at 850. SLUSA's purpose of encouraging capital formation in U.S. markets by mandating uniform federal standards for securities class actions can be achieved only if *all* district court rulings on the merits of the federal defense provided by SLUSA, including those that result in remands to state court, are subject to federal appellate review.

CONCLUSION

For the foregoing reasons, the judgment of the Seventh Court of Appeals should be affirmed.

Respectfully submitted,

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CARL KIRCHER, *et al.*,
Petitioners,

v.

PUTNAM FUNDS TRUST, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

On January 6, 2006, this Court granted the petition for a writ of certiorari in this case, limited to Question 1 of the petition:

Whether the court of appeals had jurisdiction, contrary to the holdings of three other circuits, to review a district court order remanding for lack of subject-matter jurisdiction a suit removed under the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"), notwithstanding 28 U.S.C. § 1447(d)'s bar on appellate review of remand orders based on lack of subject matter jurisdiction and the district courts' conclusion that petitioners' claims are not preempted by and thus not removable under SLUSA.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 1

ARGUMENT 3

I. IN ENACTING SLUSA, CONGRESS INTENDED TO REIN IN CIRCUMVENTION OF THE 1995 REFORM ACT 3

II. DENYING APPELLATE REVIEW OF SLUSA REMAND ORDERS WILL FRUSTRATE CONGRESS' PRIMARY PURPOSES IN ENACTING SLUSA. 8

III. REVIEW OF REMAND ORDERS SHOULD BE VIEWED IN THE CONTEXT OF CONGRESS' INTENT REGARDING SECURITIES CLAIMS. 12

CONCLUSION 13

TABLE OF AUTHORITIES

CASES

Abada v. Charles Schwab & Co.,
127 F. Supp. 2d 1101 (S.D. Cal. 2000) 10

Araujo v. John Hancock Life Ins. Co.,
206 F. Supp. 2d 377 (E.D.N.Y. 2002) 9

Arbaugh v. Y & H Corp.,
546 U.S. ___, 163 L. Ed. 1097 (2006) 3

Bachman v. A.G. Edwards,
No. 4:05 CV 0770 ERW, 2005 U.S. Dist.
LEXIS 35684 (E.D. Mo. 2005) 2

Burns v. Prudential Secs.,
116 F. Supp. 2d 917 (N.D. Ohio 2000) 9

Commissioner of Internal Revenue v. Acker,
361 U.S. 87 (1959) 4

Diamond Multimedia Sys. v. Superior Court,
19 Cal. 4th 1036 (1999), *cert. denied*, 527 U.S. 1003 (2000) 1

Dudek v. Prudential Secs., Inc.,
295 F.3d 875 (8th Cir. 2002) 10

Dura Pharmaceuticals, Inc. v. Broudo,
544 U.S. 336 (2005) 1

Gray v. Seaboard Secs., Inc.,
241 F. Supp. 2d 213 (N.D.N.Y. 2003), *rev'd in part on other grounds*, 126 Fed. Appx. 14 (2d Cir. 2005) 9, 10

In re Stock Exchanges Options Trading Antitrust Litig.,
317 F.3d 134 (2d Cir. 2003) 1

In re Silicon Graphics Inc. Secs. Litig.,
183 F.3d 970 (9th Cir. 1999) 1

Kircher v. Putnam Inv. Mgmt., LLC,
373 F.3d 847 (7th Cir. 2004) 3, 11

Kontrick v. Ryan,
540 U.S. 443 (2004) 3

Magyery v. Transamerica Financial Advisors, Inc.,
315 F. Supp. 2d 954 (N.D. Ind. 2004) 8, 9

McCullagh v. Merrill Lynch & Co.,
No. 01 Civ. 7322 (DAB), 2002 U.S. Dist.
LEXIS 3758 (S.D.N.Y. 2002) 10

Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit,
547 U.S. ___ (2006) 2, 3, 9

Riley v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,
292 F.3d 1334 (11th Cir. 2002) 9

Rowinski v. Salomon Smith Barney Inc.,
398 F.3d 294 (3d Cir. 2005) 10

Scarborough v. Principi,
541 U.S. 401 (2004) 3

Shaw v. Charles Schwab & Co.,
128 F. Supp. 2d 1270 (C.D. Cal. 2001) 10

Simon v. Internet Wire, Inc.,
No. CV 00-1395 CBM (RNBx), 2001 U.S. Dist.
LEXIS 4086 (C.D. Cal. 2001) 9

Spielman v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,
No. 01 CV 3013 (DLC), 2001 U.S. Dist. LEXIS
15943 (S.D.N.Y. 2001) 10

Things Remembered, Inc. v. Petrarca,
516 U.S. 124 (1995) 12

Thornburg v. Gingles,
478 U.S. 30 (1986) 4

Winne v. Equitable Life Assurance Society,
315 F. Supp. 2d 404 (S.D.N.Y. 2003) 9

Xpedior Creditor Trust v. Credit Suisse First Boston (USA) Inc., 341 F. Supp. 2d 258 (S.D.N.Y. 2004) 10

STATUTES AND RULES

Pub. L. No. 105-353, 112 Stat. 3227
(codified at 15 U.S.C. § 78a note) 4

Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 12 (codified at 28 U.S.C. § 1453(c)(1)) 12

28 U.S.C. § 1452(c) 13

Sup. Ct. R. 37.6 1

LEGISLATIVE MATERIAL

H.R. Rep. 105-803 (Oct. 9, 1998) 2, 5, 9

S. Rep. 105-182 (May 1998) 8

S. Rep. 109-14 (Feb. 2005) 12

144 Cong. Rec. H10,781 (Oct. 13, 1998) 6

144 Cong. Rec. S4797 (May 13, 1998) 6

144 Cong. Rec. S4799 (May 13, 1998) 7

144 Cong. Rec. S4800 (May 13, 1998) 7

144 Cong. Rec. S4802 (May 13, 1998).....6

144 Cong. Rec. S4806 (May 13, 1998).....6

144 Cong. Rec. S4809 (May 13, 1998).....6

144 Cong. Rec. S4813 (May 13, 1998).....6

INTEREST OF AMICUS CURIAE

The Washington Legal Foundation ("WLF") is a non-profit public interest law and policy center based in Washington, D.C., with supporters in all 50 states.[1] WLF devotes a substantial portion of its resources to defending and promoting free enterprise, individual rights, and a limited and accountable government. To that end, WLF has appeared before this and other federal and state courts in numerous cases raising issues relating to the proper scope of the federal securities laws. *See, e.g., Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336 (2005); *In re Stock Exchanges Options Trading Antitrust Litig.*, 317 F. 3d 134 (2d Cir. 2003); *In re Silicon Graphics Inc. Secs. Litig.*, 183 F.3d 970 (9th Cir. 1999); *Diamond Multimedia Sys. v. Superior Court*, 19 Cal. 4th 1036 (1999), *cert. denied*, 527 U.S. 1003 (2000).

WLF is concerned that if the decision below is reversed, the result will be the frustration of Congress' express intention, as embodied in two important pieces of legislation in the 1990s, that lawsuits involving nationally traded securities be decided by federal courts. WLF has no financial interest in the outcome of this lawsuit.

SUMMARY OF ARGUMENT

Appellate review of remand orders under the Securities Litigation Uniform Standards Act of 1998 ("SLUSA") is not only required by the text and structure of that statute, but is also a necessary concomitant of SLUSA's fundamental purpose. In 1998, Congress enacted SLUSA in response to a growing wave of securities litigation filed in state court. Three years earlier, Congress had adopted the Private Securities Litigation Reform Act

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[1] Pursuant to Supreme Court Rule 37.6, amicus states that no counsel for any party authored this brief in whole or in part, and that no person or entity, other than amicus and its counsel, contributed monetarily to the preparation or submission of this brief. The parties have consented to the filing of this amicus brief; pursuant to Supreme Court Rule 37.3, letters evidencing this consent have been lodged with the Clerk.

of 1995 (the "Reform Act") to curb abusive securities litigation. Among other reforms, the Reform Act significantly heightened the standards for pleading federal securities class actions, provided for a stay of all discovery prior to a federal district court order establishing the sufficiency of the complaint, and established a safe harbor for forward-looking statements. In response to these reforms, plaintiffs began filing securities class actions in state courts in record numbers. SLUSA was intended to close the door on this circumvention by preempting state class actions and making federal court the *exclusive forum* for the vast majority of securities class actions.[2]

Petitioners' position is that while federal district courts are authorized to determine the preemptive scope of SLUSA,[3] federal courts of appeal are not authorized to review the remand orders of district courts, even if those remand orders clearly misapply the law.[4] The Court's recent decision in *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. __ (2006), makes it clear that the district court's decision to remand this case was erroneous. Petitioners' argument that the district court's erroneous determination is non-reviewable because it is "jurisdictional" misconstrues both 28 U.S.C. § 1447(c)-(d) and the Court's

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[2] *See* H.R. Rep. 105-803, at 15 (Oct. 9, 1998) ("The solution to this problem is to make Federal court the *exclusive venue* for most securities fraud class action litigation involving nationally traded securities."); *Bachman v. A.G. Edwards*, No. 4:05 CV 0770 ERW, 2005 U.S. Dist. LEXIS 35684, at *7 (E.D. Mo. 2005) ("In general, SLUSA has made federal courts the *exclusive fora* for most class actions involving the purchase and sale of securities.") (internal citation and quotation omitted). All emphases in quotations in this brief have been added, unless otherwise noted.

[3] *See* Pet. Brief, 38 n.45 ("In every case removed under SLUSA, a federal court determines the 'validity' of the argument that the claims are preempted; that determination dictates whether the case was properly removed and subject to dismissal or improperly removed and subject to remand.").

[4] *See id.* at 25 ("That prohibition on appellate review applies irrespective of the correctness of the district court's conclusion . . . .").

jurisprudence clarifying the meaning of "subject-matter jurisdiction."[5]

To the extent the Court chooses to reach the merits of this appeal rather than dismiss it on mootness grounds in light of *Dabit*, this amicus brief seeks to emphasize the practical consequences of foreclosing appellate review over SLUSA remand orders. If the Court does not allow review of SLUSA remand orders of "covered class actions,"[6] it will undermine the fundamental policies underlying SLUSA – to prevent the circumvention of the Reform Act; to provide businesses with a uniform standard of liability; to promote predictability, certainty and efficiency in the interpretation and application of the securities laws; and to eliminate improper forum-shopping. The legislative history of SLUSA establishes that these were Congress' primary goals in enacting the statute, and *all* of these goals will be substantially impeded by denying appellate review of SLUSA remand orders.

ARGUMENT

I. IN ENACTING SLUSA, CONGRESS INTENDED TO REIN IN CIRCUMVENTION OF THE 1995 REFORM ACT

The primary purpose of SLUSA was to prevent the circumvention of the Reform Act by plaintiffs filing securities class actions in state court and engaging in improper forum-shopping. The text and overwhelming legislative history of SLUSA are clear regarding that intention.

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[5] *See Arbaugh v. Y & H Corp.*, 546 U.S. ___, 163 L. Ed. 1097, 1107-1111 (2006); *Kircher v. Putnam Inv. Mgmt., LLC*, 373 F.3d 847, 849-51 (7th Cir. 2004); *Kontrick v. Ryan*, 540 U.S. 443, 454-56 (2004); *Scarborough v. Principi*, 541 U.S. 401, 413-14 (2004).

[6] As Judge Easterbrook noted, there is no dispute that this action is a "covered class action," and therefore removal was proper. *Kircher*, 373 F.3d at 849. And, as the Court recently held in *Dabit*, "*all* 'covered class actions' filed in state court are removable" pursuant to SLUSA. 547 U.S. ___ (slip op., at 10 n.7).

In enacting the statute, Congress made the following express factual findings:

> The Congress finds that –
> (1) the Private Securities Litigation Reform Act of 1995 sought to prevent abuses in private securities fraud lawsuits;
> (2) since enactment of that legislation, considerable evidence has been presented to Congress that a number of *securities class action lawsuits have shifted from Federal to State courts*;
> (3) *this shift has prevented that Act from fully achieving its objectives*;
> (4) State securities regulation is of continuing importance, together with Federal regulation of securities, to protect investors and promote strong financial markets; and
> (5) *in order to prevent certain State private securities class action lawsuits alleging fraud from being used to frustrate the objectives of the Private Securities Litigation Reform Act of 1995, it is appropriate to enact national standards for securities class action lawsuits involving nationally traded securities*, while preserving the appropriate enforcement powers of State securities regulators and not changing the current treatment of individual lawsuits.

Pub. L. No. 105-353, 112 Stat. 3227 (codified at 15 U.S.C. § 78a note; emphasis added).

In its Conference Report which was agreed to by both houses,[7] Congress further expanded upon its intention when it

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[7] A Conference Report acted upon by both Houses is generally regarded as one of the most authoritative indicators of legislative intent. *See generally Thornburg v. Gingles*, 478 U.S. 30, 43 n.7 (1986) ("We have repeatedly recognized that the authoritative source for legislative intent lies in the Committee Reports on the bill."); *Commissioner of Internal Revenue v. Acker*, 361 U.S. 87, 94 (1959) (Frankfurter, J., dissenting)

enacted SLUSA: "The purpose of this title is to prevent plaintiffs from seeking to evade the protections that Federal law provides against abusive litigation by filing suit in State, rather than in Federal, court." H.R. Rep. 105-803, at 13 (Oct. 9, 1998). Quoting a study by former Securities and Exchange Commission member Joseph A. Grundfest and Stanford Law School faculty member Michael A. Perino, the Conference Report noted the substantial increase in securities class actions filed in state court following the passage of the Reform Act:

> The evidence presented in this report suggests that the level of class action securities fraud litigation has declined by about a third in federal courts, but that there has been an almost equal increase in the level of state court activity, largely as a result of a "substitution effect" whereby plaintiffs resort to state court to avoid the new, more stringent requirements of federal cases.

Id. at 14 (quoting J. Grundfest & M. Perino, *Securities Litigation Reform: The First Year's Experience: A Statistical and Legal Analysis of Class Action Securities Fraud Litigation under the Private Securities Litigation Reform Act of 1995*, Stanford Law School (Feb. 27, 1997)).[8]

("The most authoritative report is a Conference Report acted upon by both Houses and therefore unequivocally representing the will of both Houses as the joint legislative body.").

[8] *See also id.* at 14 ("Prior to the passage of the Reform Act, there was essentially no significant securities class action litigation in State court. In its Report to the President and the Congress . . . the SEC called the shift of securities fraud from Federal to State court 'potentially the most significant development in securities litigation' since passage of the Reform Act.") & 14-15 ("The managers also determined that, since passage of the Reform Act, plaintiffs' lawyers have sought to circumvent the Act's provisions by exploiting differences between Federal and State laws by filing frivolous and speculative lawsuits in State court, where essentially none of the Reform Act's procedural or substantive protections against abusive suits are available.").

In order to prevent this forum-shopping, SLUSA was enacted to provide a uniform set of standards for securities litigation. *Id.* at 13 ("[T]his legislation establishes *uniform national rules* for securities class action litigation involving our national capital markets.") & 15 ("The solution to this problem is to make Federal court the *exclusive venue* for most securities fraud class action litigation involving nationally traded securities.").

This bipartisan concern about forum-shopping was echoed in the statements of many individual legislators. *See, e.g.*, 144 Cong. Rec. S4813 (statement of Sen. Domenici) (May 13, 1998) ("The bill will keep plaintiffs' lawyers from picking State courts to do what . . . we know they are already doing – they look for a sympathetic state forum where they can get these lawsuits filed."); 144 Cong. Rec. S4809 (statement of Sen. D'Amato) (May 13, 1998) ("this bill . . . will stop the strike action suits, the forum shopping that we have attempted to limit"); 144 Cong. Rec. S4797 (statement of Sen. Feinstein) (May 13, 1998) ("Further, this legislation would prevent 'forum shopping,' a method for nuisance lawsuits to be initiated in the most sympathetic state jurisdiction."); 144 Cong. Rec. H10,781 (statement of Rep. Cox) (Oct. 13, 1998) ("To address this inequity and assert that national markets require nationally applied rules, this legislation will make federal courts the exclusive venue for large-scale securities fraud lawsuits involving securities subject to federal regulation under the 1996 National Markets Act.").

Congress also emphasized that a uniform set of standards would create a *certain, predictable* business environment. *See* 144 Cong. Rec. S4813 (statement of Sen. Boxer) (May 13, 1998) ("We, as policymakers, must establish a regulatory environment in which . . . the high-growth industries of our economy . . . are provided *the stability and certainty they need to expand, grow, and create jobs.*"); 144 Cong. Rec. S4806 (statement of Sen. Dodd) (May 13, 1998) ("What is before us is whether or not we are going to have one standard here so that we can try to have some *predictability* and a little fairness in this process."); 144 Cong. Rec. S4802 (statement of Sen. Kerry) (May 13, 1998) ("Moving all class action securities lawsuits to federal court should lead to

the creation of a more *favorable, stable climate for businesses* . . . .").

Uniformity also was viewed by Congress as essential for the proper functioning of an efficient national securities market:

> It simply makes no sense to open those who make statements about national securities on a national basis to class actions brought under 50 separate State regulatory regimes – not if we want efficient and well-functioning securities markets, that is. In short, *not only is a uniform standard appropriate in this case; it provides perhaps the quintessential example of something that should be subject to one set of standards nationwide.*

144 Cong. Rec. S4799 (statement of Sen. Lieberman) (May 13, 1998); *see also* 144 Cong. Rec. S4800 (statement of Sen. Reed) (May 13, 1998) ("I favor this legislation because it recognizes the national nature of our securities markets, provides for more *efficient capital formation*, and protects investors.").[9]

Finally, Congress intended for SLUSA to be given a broad interpretation as to its preemptive scope in order to ensure that its remedial purposes were effectuated:

> [W]hile the Committee believes that it has effectively reached those actions that could be used to circumvent the reforms enacted by Congress in 1995 as part of the Private Securities Litigation Reform Act, *it remains the Committee's intent that the bill be interpreted broadly* to reach mass actions and all other procedural devices that might be used to circumvent the class action definition.

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[9] *Cf. Dabit*, 547 U.S. ___ (slip op., at 5) ("The magnitude of the federal interest in protecting the integrity and efficient operation of the market for nationally traded securities cannot be overstated.").

S. Rep. 105-182, at 8 (May 1998) (Committee Report by the Senate Committee on Banking, Housing, and Urban Affairs).

II. DENYING APPELLATE REVIEW OF SLUSA REMAND ORDERS WILL FRUSTRATE CONGRESS' PRIMARY PURPOSES IN ENACTING SLUSA

The essential policies embodied in SLUSA will be substantially eroded if the Court reverses the Seventh Circuit's decision. Although Congress intended for SLUSA's preemptive scope to be interpreted broadly, not all district courts have followed that approach. As one district court has observed, "[t]he district court cases appear to be all over the map on the issue of what state law claims are preempted by SLUSA." *Magyery v. Transamerica Financial Advisors, Inc.*, 315 F. Supp. 2d 954, 959 (N.D. Ind. 2004).

Denying appellate review of SLUSA remand orders would compound this problem in at least two fundamental ways. First, if remand orders are non-appealable, the non-uniformity will continue to go unresolved, leading to different interpretations of the breadth of SLUSA's preemptive scope among different circuits and even within circuits. This undermines predictability and certainty for litigants and would promote forum-shopping. Second, prohibiting appeals from remand orders would cut in the opposite direction that Congress intended. Congress intended SLUSA to be interpreted broadly, so that the vast majority of securities litigation would occur in federal court. If remand orders are non-appealable, then erroneously over-narrow interpretations of SLUSA will be non-reviewable. On the other hand, if a federal district court interprets SLUSA too broadly and erroneously refuses to remand a case, such an order would be appealable. This runs counter to one of the fundamental policies of SLUSA, which is to ensure that securities class actions (with a few narrow exceptions) remain exclusively in federal court.[10]

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[10] In effect, under petitioners' interpretation, appellate review under SLUSA only protects *plaintiffs* trying to stay in state court rather than

The need for appellate review of SLUSA remand orders is underscored by the wide diversity in opinions concerning the preemptive scope of SLUSA. While the Court's decision in *Dabit* has resolved one of the substantive issues concerning the scope of SLUSA – i.e., whether SLUSA applies to "holder" claims – there are splits in authority concerning a number of other issues related to the statute's preemptive scope. These include: (a) whether a complaint must allege scienter to be preempted under SLUSA,[11] (b) whether preemption is properly analyzed on a claim-by-claim basis or by looking at the complaint in its entirety,[12] (c) whether

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defendants seeking the protections of federal court. Given Congress' express purpose in enacting SLUSA, it is difficult to imagine that Congress intended such a result. *See* H.R. Rep. 105-803, at 13 (Oct. 9, 1998) ("The purpose of this title is to prevent plaintiffs from seeking to evade the protections that Federal law provides against abusive litigation by filing suit in State, rather than in Federal, court.").

[11] *Compare Burns v. Prudential Secs.*, 116 F. Supp. 2d 917, 923-26 (N.D. Ohio 2000) (plaintiff must allege facts giving rise to a strong inference of scienter for SLUSA preemption to apply); *Simon v. Internet Wire, Inc.*, No. CV 00-13195 CBM (RNBx), 2001 U.S. Dist. LEXIS 4086, at *6-*10 (C.D. Cal. 2001) (same) *with Winne v. Equitable Life Assurance Society*, 315 F. Supp. 2d 404, 413-15 (S.D.N.Y. 2003) (disagreeing with *Burns* and *Simon* and holding that SLUSA has no scienter requirement); *Riley v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 292 F.3d 1334, 1346 (11th Cir. 2002) ("... . SLUSA preempts some claims . . . that lack a scienter requirement."). *See also Magyery*, 315 F. Supp. at 959 (N.D. Ind. 2004) ("A careful reading of the cases reveals that many of the differences are based on variations in the facts, but there is a clear split among the courts on the issue of whether the Plaintiffs' claims must allege "scienter" for SLUSA preemption to apply.").

[12] *Compare Gray v. Seaboard Secs., Inc.*, 241 F. Supp. 2d 213, 219 (N.D.N.Y. 2003) ("[T]he fact that SLUSA preempts *some* causes of action in a complaint does not entitle a defendant to broadly invoke federal preemption against the entire complaint.") (emphasis in original), *rev'd in part on other grounds*, 126 Fed. Appx. 14 (2d Cir. 2005) *with Winne*, 315 F. Supp. 2d at 417 (S.D.N.Y. 2003) ("[R]eading the Complaint in its entirety . . . plaintiff's breach of contract claim is really a fraud claim, which must be dismissed under SLUSA . . . ."); *Araujo v. John Hancock Life Ins. Co.*, 206 F. Supp. 2d 377, 384-85 (E.D.N.Y. 2002) (holding that breach of contract and unjust enrichment claims are

the "in connection with" requirement is satisfied only by allegations concerning transactions in particular securities,[13] and (d) whether the alleged misrepresentations must be a "necessary component" of plaintiffs' complaint.[14] Appellate review of

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preempted where a plaintiff generally alleges fraud in connection with the purchase or sale of securities); *Dudek v. Prudential Secs., Inc.*, 295 F.3d 875, 880 (8th Cir. 2002) (preempting all causes of action where "the essence of [the complaint] is the unlawful marketing of [securities] . . . .").

[13] *Compare Abada v. Charles Schwab & Co.*, 127 F. Supp. 2d 1101, 1103 (S.D. Cal. 2000) (where alleged misrepresentations concerned broker's ability to expedite trades and did not relate to any particular securities, SLUSA did not preempt claims); *Shaw v. Charles Schwab & Co.*, 128 F. Supp. 2d 1270, 1274 (C.D. Cal. 2001) (same); *Spielman v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, No. 01 CIV. 3013 (DLC), 2001 U.S. Dist. LEXIS 15943 (S.D.N.Y. 2001) (alleged misrepresentations about transaction fees "did not concern the value of those securities, or the consideration received in return for trading the securities" and thus SLUSA did not preempt state law claims) *with Gray v. Seaboard Secs., Inc.*, 126 Fed. Appx. 14, 16 (2d Cir. 2005) (SLUSA preempted fraud claims, even though misrepresentations did not relate to particular stocks, where representations related to the source of investment advice and caused plaintiffs to pay commissions "which accrued only upon the purchase or sale of securities"); *McCullagh v. Merrill Lynch & Co.*, No. 01 Civ. 7322 (DAB), 2002 U.S. Dist. LEXIS 3758, at *7-12 (S.D.N.Y. 2002) ("in connection with" requirement was satisfied by allegations that Merrill Lynch's brokerage and investment banking divisions were not independent, even though the complaint did not allege purchase of particular stocks).

[14] *Compare Xpedior Creditor Trust v. Credit Suisse First Boston (USA) Inc.*, 341 F. Supp. 2d 258, 268 (S.D.N.Y. 2004) ("Regardless of the words used by plaintiffs in their complaints and regardless of the labels they paste on each claim, the question is whether a material misstatement or omission in connection with the purchase or sale of a covered security is a *necessary component* of the claim.") (emphasis in original) *with Rowinski v. Salomon Smith Barney Inc.*, 398 F.3d 294, 300 (3d Cir. 2005) ("preemption does not turn on whether allegations are characterized as facts or as essential legal elements of a claim, but rather on whether the SLUSA prerequisites are 'alleged' in one form or another"). *See also Gray*, 126 Fed. Appx. at 16 (2d Cir. 2005) (characterizing *Rowinski*'s holding as "SLUSA preempts claims which allege a material

SLUSA remand orders of "covered class actions"[15] will help harmonize the case law, thereby promoting uniformity and predictability while preventing forum-shopping. *See Kircher*, 373 F.3d at 850 ("Appellate review of decisions under § 77p(b) will promote accurate and consistent implementation of that statute, at little cost in delay beyond what the authorized removal itself creates.").

Finally, appellate review of SLUSA remand orders of "covered class actions" is necessary to ensure that defendants in securities fraud cases are not improperly shut out of federal court. As noted by the court below,

> [n]ormal remands, for which § 1447(d) is designed, leave all substantive issues open to plenary resolution in the state court (and, if necessary, the Supreme Court of the United States). That's not how SLUSA works; *it is now or never for appellate review of the question whether an action under state law is preempted.*

Id. Without appellate review, defendants in abusive securities class actions – the very class of persons SLUSA was designed to protect – will have no recourse to challenge improper rulings concerning the scope of SLUSA preemption.

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misrepresentation or omission in connection with the purchase or sale of securities *whether or not that allegation is an element of or otherwise necessary to the putative state claim*").

[15] N.B.: Each of the splits in authority cited above relates to the *substantive* scope of preemption under § 77p(b)(1)-(2), not whether a particular action is a "covered class action."

III. REVIEW OF REMAND ORDERS SHOULD BE VIEWED IN THE CONTEXT OF CONGRESS' INTENT REGARDING SECURITIES CLAIMS

In analyzing the reviewability of remand orders under SLUSA, it is important to focus on the structure and policies of *that* statute. Petitioners argue that § 1447(d)'s general prohibition of appellate review applies "[a]bsent a clear statutory command to the contrary . . . ." Pet. Brief at 28-29 (quoting *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 128 (1995)). However, the Court's statement in *Things Remembered* was made in a case in which there was "no dispute" that the removal was made on grounds contemplated by § 1447(c). 516 U.S. at 128. Here, where the applicability of § 1447(c) is, at a minimum, disputed (although, in amicus' view, it does not cover the district court's remand order), the Court may infer Congress' intent to allow review of SLUSA remand orders based on the structure and policies of that statute, even without an explicit statutory command.

Similarly, it is inappropriate to rely on Congress' recent *inclusion* of a specific appellate reviewability provision in the Class Action Fairness Act of 2005 ("CAFA") to read the *exclusion* of a similar provision from SLUSA. *See* Pub. L. No. 109-2, 119 Stat. 12 (codified at 28 U.S.C. §1453(c)(1)). Petitioners argue that because CAFA contains such a provision and SLUSA does not, "§ 1447(d)'s prohibition on appellate review applies to district court orders remanding a case for lack of subject-matter jurisdiction under SLUSA." Pet. Brief, 30. But this argument is not supported by CAFA's legislative history. In enacting CAFA, Congress specifically recognized and *chose not to disturb* the framework it established for the adjudication of securities claims in the Reform Act and SLUSA. *See, e.g.*, S. Rep. 109-14, at 49 (Feb. 2005) (Committee Report by the Senate Committee on the Judiciary). Congress included in CAFA a provision providing for the appellate review of remand orders in order "to develop a body of appellate law interpreting the legislation without unduly delaying the litigation of class actions," and noted that § 1447's prohibition on remand order review was added only after "the federal diversity jurisdictional statutes and the related removal statutes had been subject to appellate review for many years and

were the subject of considerable appellate level interpretive law." *Id.* At the same time, Congress specifically provided that CAFA's removal provisions (and the review of removal orders under them) "shall not apply to [federal securities claims] . . . [b]ecause Congress has previously enacted legislation governing the adjudication of these claims, [and] it is the Committee's intent *not to disturb the carefully crafted framework for litigating in this context.*" *Id.* at 49-50. If Congress' intent had been to prevent the federal appellate courts from reviewing remand orders pursuant to SLUSA, it could and would have provided for exactly that, as it has in other contexts. *See, e.g.*, 28 U.S.C. § 1452(c) (specifically prohibiting review of remand orders in cases removed under the federal courts' bankruptcy jurisdiction).

CONCLUSION

For the reasons stated above, the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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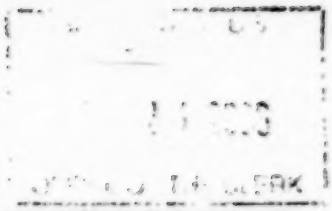

No. 05-409

IN THE

Supreme Court of the United States

CARL KIRCHER, ET AL.,
Petitioners,

v.

PUTNAM FUNDS TRUST, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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February 21, 2006

QUESTION PRESENTED

On January 6, 2006, this Court granted the petition for a writ of certiorari in this case, limited to Question 1 of the petition:

Whether the court of appeals had jurisdiction, contrary to the holdings of three other circuits, to review a district court order remanding for lack of subject-matter jurisdiction a suit removed under the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"), notwithstanding 28 U.S.C. § 1447(d)'s bar on appellate review of remand orders based on lack of subject-matter jurisdiction and the district courts' conclusion that petitioners' claims are not preempted by and thus not removable under SLUSA.

LIST OF PARTIES TO THE PROCEEDINGS

Petitioners Carl Kircher, Beth Dudley, Steve Dudley, Avery Jackson, Dorothy Luettinger, T.K. Parthasarathy, Robert Potter, Terry Spurgeon, as Custodian for the Benefit of James E. Spurgeon, and Gary Vogeler were plaintiffs in the district court and appellees in the court of appeals.*

Robert Brockway, Sharon Smith, Stuart A. Smith, and Edmund Woodbury also were plaintiffs in the district court but did not participate in the court of appeals proceedings, and thus are not parties to this appeal.

The following were defendants in the district court and appellants in the court of appeals, and are respondents here:

Artisan Funds, Inc.

Artisan Partners Limited Partnership

Columbia Acorn Trust

Columbia Wanger Asset Management L.P.

Deutsche Investment Management Americas Inc.

Janus Capital Management LLC

Janus Investment Fund

Pacific Life Insurance Company

Putnam Funds Trust

Putnam International Equity Fund

Putnam Investment Funds

Putnam Investment Management, LLC

Scudder International Fund, Inc.

Van Kampen Investment Advisory Corporation

Van Kampen Series Fund, Inc.

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* Petitioners each filed suit as individuals and on behalf of all others similarly situated

AIM Advisors, Inc., AIM International Funds, Inc., Evergreen International Trust, Evergreen Investment Management Company LLC, T. Rowe Price International Funds, Inc., T. Rowe Price International, Inc., Templeton Funds, Inc., Templeton Global Advisors Limited, Templeton Global Smaller Companies Fund, Inc., Templeton Growth Fund, Inc., and Templeton Investment Counsel LLC also were defendants in the district court but did not participate in the court of appeals proceedings, and thus are not parties to this appeal.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

LIST OF PARTIES TO THE PROCEEDINGS ii

TABLE OF AUTHORITIES vi

INTRODUCTION 1

OPINIONS BELOW 2

JURISDICTION 2

STATUTORY AND REGULATORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 16

ARGUMENT 19

I. DISTRICT COURT ORDERS REMANDING TO STATE COURT FOR LACK OF SUBJECT-MATTER JURISDICTION UNDER SLUSA ARE NOT REVIEWABLE ON APPEAL 19

A. By Long-Standing Statutory Prohibition, The General Rule Is That Courts Of Appeals Lack Jurisdiction To Consider Appeals Of District Court Orders Remanding A Removed Case Back To State Court 19

B. The District Courts' Remand Orders Below Were Expressly Based On Lack Of Subject-Matter Jurisdiction And Are Therefore Unreviewable 24

C. SLUSA's Removal Provision Does Not Affect § 1447(d)'s General Prohibition On Appellate Review Of Remand Orders 28

II. SLUSA MAKES REMOVAL JURISDICTION DEPENDENT ON PREEMPTION 30

A. SLUSA's Removal Provision Creates Federal-Question Jurisdiction For State-Law Claims If And Only If SLUSA Preempts Them 30

B. The Court Of Appeals' Interpretation Is Unsupported By The Statutory Text And This Court's Cases 36

III. PERMITTING REVIEW OF SLUSA REMAND ORDERS WOUD CONTRAVENE CONGRESS'S POLICY JUDGMENT IN § 1447(d) 45

CONCLUSION 48

TABLE OF AUTHORITIES

CASES

Adkins v. Illinois Cent. R.R., 326 F.3d 828 (7th
2003) .....

Anusbigian v. Trugreen/Chemlawn, Inc., 72 F
1253 (6th Cir. 1996) .....

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(2003) .....

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723 (1975) 15,

Bradfisch v. Templeton Funds, Inc., Case No. 03-
0760-MJR (S.D. Ill. Jan. 23, 2004) .....

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Briscoe v. Bell, 432 U.S. 404 (1977) .....

Bushnell v. Kennedy, 76 U.S. (9 Wall.) 387 (1870)

Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343 (19

Caterpillar Inc. v. Williams, 482 U.S. 386 (1987) .

Chicago, St. P., M. & O. Ry. Co. v. Roberts, 141 U
690 (1891) .....

Chick Kam Choo v. Exxon Corp., 486 U.S. 140 (19

Daily Income Fund, Inc. v. Fox, 464 U.S. 523 (198

Employers Reinsurance Corp. v. Bryant, 299 U
374 (1937) .....

Falkowski v. Imation Corp., 309 F.3d 1123 (20
amended, 320 F.3d 905 (9th Cir. 2003) .....

*Franchise Tax Bd. v. Construction Laborers Va
tion Trust for Southern California*, 463 U.S
(1983) .....

Gardner v. Brown, 88 U.S. (21 Wall.) 36 (1875) ....

Gay v. Ruff, 292 U.S. 25 (1934) 22

German Nat'l Bank v. Speckert, 181 U.S. 405 (1901).....22

Glasser v. Amalgamated Workers Union Local 88, 806 F.2d 1539 (11th Cir. 1986).....35

Gonzalez-Garcia v. Williamson Dickie Mfg. Co., 99 F.3d 490 (1st Cir. 1996) 35

Gravitt v. Southwestern Bell Tel. Co., 430 U.S. 723 (1977) 25, 26, 27

Green v. Custard, 64 U.S. (23 How.) 484 (1860).....21

Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473 (1981) 47

Gully v. First Nat'l Bank, 299 U.S. 109 (1936).....31

Gurnee v. Patrick County, 137 U.S. 141 (1890) 22

Hagans v. Lavine, 415 U.S. 528 (1974).....21

Harter Township v. Kernochan, 103 U.S. 562 (1881).....29

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Transit Cas. Co. v. Certain Underwriters at Lloyd's of London, 119 F.3d 619 (8th Cir. 1997) 35

United States v. Cotton, 535 U.S. 625 (2002) 44

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Xpedior Creditor Trust v. Credit Suisse First Boston (USA) Inc., 341 F. Supp. 2d 258 (S.D.N.Y. 2004) 42

STATUTES AND REGULATIONS

Act of Mar. 3, 1887, ch. 373, 24 Stat. 552 22

§ 1, 24 Stat. 553 22

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§ 5(a):

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Securities Act of 1933, 15 U.S.C. §§ 77a *et seq.* 2-3, 4, 5

15 U.S.C. § 77p 39

15 U.S.C. § 77p(b).....4, 5, 10, 11, 14, 17, 18, 27, 32, 36, 39, 40, 41, 43, 45

15 U.S.C. § 77p(b)(1).....12, 40

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15 U.S.C. § 77p(d).....5, 28, 39

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15 U.S.C. § 77p(d)(2).....5, 39

15 U.S.C. § 77p(d)(3).....5, 39

15 U.S.C. § 77p(d)(4).....5, 14, 39

15 U.S.C. § 77p(f)(2)(A).....14

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15 U.S.C. § 77r(b)(1)-(2).....5

15 U.S.C. § 77z-1.....2

Securities Exchange Act of 1934, 15 U.S.C. §§ 78a *et seq.*.....3, 4, 5

§ 10(b), 15 U.S.C. § 78j(b).....12, 15, 17, 40, 41, 43

§ 21, 15 U.S.C. § 78u.....2

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§ 2, 112 Stat. 3227.....3

§ 2(1), 112 Stat. 3227.....3

§ 2(2), 112 Stat. 3227.....3

§ 2(3), 112 Stat. 3227 3
§ 2(4), 112 Stat. 3227 3
§ 2(5), 112 Stat. 3227 3
12 U.S.C. § 1441a(*l*)(3)(C) 29
12 U.S.C. § 1819(b)(2)(C) 29
15 U.S.C. § 80a-2(a)(41)(B)(ii) 6
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28 U.S.C. § 1254(1) 2
28 U.S.C. § 1441 ..... 11, 12, 16
28 U.S.C. § 1442(a)1) 38
28 U.S.C. § 1443 ..... 20, 29
28 U.S.C. § 1447 ..... 23, 40, 47
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28 U.S.C. § 1447(d) 1, 13, 14, 16, 18, 19, 20, 21, 22, 23, 24, 25, 26, 28, 29, 30, 45, 47
28 U.S.C. § 1452 29
17 C.F.R.:
§ 240.10b-5 (Rule 10b-5) 12, 15, 17, 40, 41, 43
§ 270.2a-4(a) 6

LEGISLATIVE MATERIALS

H.R. Conf. Rep. No. 105-803 (1998) 2

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H.R. Rep. No. 105-640 (1998) 5, 32

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INTRODUCTION

This case concerns the appealability of an order remanding back to state court a case removed by defendants to federal court. For the better part of two centuries, the general rule has been (and has been codified since 1949 at 28 U.S.C. § 1447(d)) that a remand order based on a district court's conclusion that it lacks subject-matter jurisdiction is *not* appealable. Congress's rationale in establishing that rule is that litigants should not be forced to sustain further delay in reaching the merits of their suit through appellate review of remand orders. That rule applies generally no matter what statutory context is at issue, and the few exceptions Congress has specifically enacted for discrete circumstances (such as appellate review of remand orders involving federal agencies) are not implicated here.

In a departure from this Court's decisions interpreting § 1447(d) and those of every other court of appeals to judge the appealability of remand orders in cases removed under the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"), the Seventh Circuit devised a novel and erroneous theory to justify its decision to accept appellate jurisdiction. The court reasoned that SLUSA empowers courts of appeals to sit in judgment of district court orders remanding cases on the ground that the plaintiffs' claims do not in fact fall within SLUSA's preemptive ambit. In so doing, the court ignored both a key phrase in SLUSA's removal provision that limits removal jurisdiction to only those class-action claims that are preempted by SLUSA and the general rule of non-appealability that this Court has reaffirmed numerous times. If remand orders were reviewable anytime the court of appeals disagrees with the district court's reading of a jurisdictional statute – especially where, as here, the district court decisions are all consistent with the holdings of every circuit to have addressed this issue of federal subject-matter jurisdiction and remand under SLUSA – then Congress's prohibition on reviewability would be eviscerated. Because the Seventh Circuit's decision judicially re-writes a congressional

statute, misapplies this Court's precedent, and evades the central policy choice Congress has made generally to deny appellate review of remand orders, the decision below should be reversed.

OPINIONS BELOW

The district courts' opinions granting plaintiffs' motions to remand (Pet. App. 23a-64a) are unreported. The court of appeals' opinions finding appellate jurisdiction (*id.* at 10a-17a), and reversing and remanding the district courts' judgments with instructions to undo the remand orders and to dismiss plaintiffs' state-law claims (*id.* at 1a-9a), are reported at 373 F.3d 847 and 403 F.3d 478.

JURISDICTION

The court of appeals entered its judgment on April 5, 2005. A timely petition for rehearing was denied on May 2, 2005. Pet. App. 65a. On July 22, 2005, Justice Stevens extended the time for filing a petition for a writ of certiorari to and including August 30, 2005, *id.* at 143a, and, on August 26, 2005, further extended the time for filing to and including September 29, 2005, *id.* at 144a. The petition for a writ of certiorari was filed on September 29, 2005, and on January 6, 2006, this Court granted certiorari, limited to Question 1 of the petition (126 S. Ct. 979). The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Relevant statutory and regulatory provisions are set forth at App., *infra*, 1a-32a.

STATEMENT OF THE CASE

1. In 1995, Congress enacted the Private Securities Litigation Reform Act ("PSLRA"), Pub. L. No. 104-67, 109 Stat. 737 (codified in part at 15 U.S.C. §§ 77z-1, 78u), to prevent "strike suits," or meritless class actions alleging fraud in the securities market. *See* H.R. Conf. Rep. No. 105-803, at 13 (1998). To deter such suits, the PSLRA imposed stringent pleading and other procedural requirements on securities class actions asserting claims under "this Title," *i.e.*, those statutes (the Securities Act of

1933 ("1933 Act") and the Securities Exchange Act of 1934 ("1934 Act")) pursuant to which courts had implied a private right of action for plaintiffs harmed by fraudulent practices. *See* PSLRA § 101, 109 Stat. 737-49. The PSLRA did not affect any state-law remedy or procedure at all; rather, it was explicitly aimed only at curbing perceived abuses in federal securities actions.

Within three years, however, Congress concluded that the more stringent pleading requirements it had enacted in the PSLRA were being evaded by plaintiffs bringing, in state court under state law, claims that in all pertinent respects were the types of claims that heretofore had been brought as federal claims. But, because those state-law claims did not invoke the federal securities laws, they were not subject to the heightened pleading requirements of the PSLRA. To address what it felt was circumvention of the intent behind the PSLRA, Congress enacted the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"), Pub. L. No. 105-353, 112 Stat. 3227.

In explaining its purposes in promulgating SLUSA, Congress made specific findings in § 2 of the Act. In § 2(1), Congress stated that "the [PSLRA] sought to prevent abuses in private securities fraud lawsuits." 112 Stat. 3227. In § 2(2), Congress found that, "since enactment of that legislation, considerable evidence has been presented to Congress that a number of securities class action lawsuits have shifted from Federal to State courts." *Id.* In § 2(3), Congress determined that "this shift has prevented that Act from fully achieving its objectives." *Id.* Accordingly, in § 2(5), Congress found that, "in order to prevent certain State private securities class action lawsuits alleging fraud from being used to frustrate the objectives of the [PSLRA], it is appropriate to enact national standards for securities class action lawsuits involving nationally traded securities, while preserving the appropriate enforcement powers of State securities regulators and not changing the current treatment of individual lawsuits." *Id.* Nevertheless, in § 2(4), Congress concluded that "State securities regulation is of continuing impor-

tance, together with Federal regulation of securities, to protect investors and promote strong financial markets." *Id.*

To effectuate those findings, Congress amended the 1933 and 1934 Acts to contain identical provisions that preempt certain class actions under state law. SLUSA's preemption and removal provisions – which are at issue in this case – are found in adjacent subsections. *See* 15 U.S.C. § 77p(b)-(c). The preemption provision, § 77p(b), provides:

> **(b) Class action limitations**
>
> No covered class action based upon the statutory or common law of any State or subdivision thereof may be maintained in any State or Federal court by any private party alleging –
>
> (1) an untrue statement or omission of a material fact in connection with the purchase or sale of a covered security; or
>
> (2) that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security.

Id. § 77p(b).

SLUSA's adjacent removal provision, § 77p(c), provides for removal with reference back to the set of claims preempted by subsection (b):

> **(c) Removal of covered class actions**
>
> Any covered class action brought in any State court involving a covered security, as set forth in subsection (b) of this section, shall be removable to the Federal district court for the district in which the action is pending, and shall be subject to subsection (b).

Id. § 77p(c).[1] Under SLUSA, a "covered class action" is defined as, *inter alia*, a "lawsuit in which . . . damages are sought on behalf of more than 50 persons or prospective class members," *id.* § 77p(f)(2)(A)(i)(I), and a "covered security" includes a security that is either listed on a national securities exchange or issued by an investment company, *id.* §§ 77p(f)(3), 77r(b)(1)-(2).[2]

2. Petitioners are among the more than 90 million individual long-term investors estimated by the Federal Reserve to have more than $4 trillion in long-term savings invested in mutual funds with substantial holdings in international stocks.[3] In 2003, petitioners filed eight separate class actions in state court alleging only state negli-

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[1] These preemption and removal provisions are from SLUSA's amendment to the 1933 Act. As the court of appeals held in this case, those 1933 Act provisions are "functionally identical" to the preemption and removal provisions added by SLUSA to the 1934 Act and codified at 15 U.S.C. § 78bb(f)(1)-(2). Pet. App. 11a; *see also* H.R. Rep. No. 105-640, at 18 (1998) (stating that amendments to the 1934 Act were intended "to effect changes . . . that are substantially similar to, and consistent with, the amendments" to the 1933 Act). Because the court of appeals for simplicity relied solely on the 1933 Act provisions in its analysis, this brief henceforth will do the same.

[2] Section 77p(d), which is not at issue in this case, preserves certain state actions that would otherwise be preempted (and therefore removable) pursuant to § 77p(b) and (c). Specifically, § 77p(d)(1) preserves covered class actions involving the conduct of corporate officers with respect to certain corporate actions including tender offers, exchange offers, and the exercise of dissenter's or appraisal rights. § 77p(d)(2) preserves suits brought by States, their political subdivisions, or their pension plans so long as each plaintiff is named and has authorized the suit; and § 77p(d)(3) preserves state actions concerning bond indentures. *See* H.R. Rep. No. 105-640, at 16-17. In addition, § 77p(d)(4) provides that, if a removed action "may be maintained in State court pursuant to this subsection" – *i.e.*, it is expressly preserved by subsection (d)(1)-(3) despite the fact that it qualifies for preemption and thus removal under § 77p(b) and (c) – then the district court must remand the action back to state court.

[3] *See* Financial Policy Forum, *Special Policy Brief 13 – Overview of Mutual Fund Scandal "A Gauntlet of Fraud,"* at *3 (Dec. 14, 2003, updated May 21, 2004), *available at* http://www.financialpolicy.org/fpfspb13.htm.

gence and recklessness claims and no federal or state-law fraud claims. Collectively, the complaints charge respondents – several mutual funds and investment advisors, and an insurance company that allows mutual fund investments through its variable annuity products – with negligently and recklessly failing to protect long-term investors adequately from market timing.

a. As alleged in petitioners' suits, "market timing" is a practice by certain traders who time their investments in mutual funds[1] holding international stocks according to shifts in the market that take advantage of stale prices for stocks traded on foreign stock exchanges. Market timing works to devalue the holdings of millions of mutual fund investors who hold for the long term rather than sell their fund shares in the short term. In contrast to the ordinary investor who holds his investments long-term, market timers buy and sell mutual funds in quick succession – often trading in and out of the same shares within 24 hours – to take advantage of international time zone differences that cause a fund holding international stocks to be either undervalued or overvalued at the end of the U.S. trading day.

A mutual fund holding assets that trade in competitive markets must value those assets at their market price. *See* 15 U.S.C. § 80a-2(a)(41)(B)(ii); 17 C.F.R. § 270.2a-4(a). Most mutual funds calculate the net asset (*i.e.*, market) value, or "NAV," of their entire portfolio only once per day, typically at the 4:00 p.m. Eastern Time close of trading on New York exchanges. Funds ordinarily calculate their NAV by valuing each asset in their portfolio at the final price at which it traded on its native exchange that day. For assets listed on the New York exchanges, the NAV generally supplies an up-to-date value. But, for assets listed on foreign exchanges, some of which may have closed as many as 15 hours before the close of the New

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[1] Mutual funds invest in a number of assets, typically individual stocks. *See* www.sec.gov/investor/tools/mfcc/mutual-fund-help.htm (Oct. 17, 2005).

York market, that approach opens a temporary yet wide window for arbitrage. (European markets close 5 or 6 hours before New York and Asian markets close 12 to 15 hours before New York.)

Because the NAV is calculated using the closing price of each asset on its native exchange – and not its real-market value based on information revealed *after* the close of trading on that native exchange – the fund will often give its portfolio an artificially high or low value. Stale information used to calculate the NAV thereby creates opportunities to purchase or sell fund shares at an immediate profit.

Market timers take their short-swing profits by purchasing mutual fund shares on days when the foreign securities in a fund's portfolio are undervalued and redeeming shares on days when the foreign securities are overvalued. Consider, for example, a foreign security in a fund's portfolio that closed at $10 on its native exchange but, through a trend that emerges that day on other international exchanges, is highly likely to rise in price on the following trading day. As sophisticated investors, market timers know that the price of foreign securities on their native exchange will likely track the movements of like market sectors or stocks in the U.S. market and accordingly move in like directions the following day. Market timers profit from this information lag by purchasing shares of mutual funds having an NAV that reflects stale, lower foreign-securities prices, and then selling those same fund shares soon thereafter, after the price of the securities has risen on their native exchanges and the mutual fund NAVs have been recalculated to reflect that rise.[3]

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[3] Judge Easterbrook's opinion for the court below provides the following illustration: "Stock of a Japanese firm that closes in Tokyo at ¥10,000 might trade in Frankfurt at € 75.22 (equivalent to ¥10,500) between the close in Tokyo and the close in New York – but the mutual fund nonetheless would value each share at ¥10,000, because that was its most recent price in the issuer's home market." Pet. App. 2a.

The rationale of petitioners' common-law negligence and recklessness claims is that, while day-trading arbitrageurs are the obvious winners in market-timing schemes, their profits are supplied dollar-for-dollar by long-term holders of mutual fund shares, which are continually devalued by ongoing market timing. When an outdated NAV causes a mutual fund to value its shares at an artificially low price, market timers buy shares in the undervalued mutual fund and receive a greater ownership interest in the fund than they would if the NAV had been accurately calculated. Those purchasing market timers consequently dilute the value of fund shares already held by long-term investors. On the other hand, when an outdated NAV causes the fund to value its shares at an artificially high price, market timers sell the mutual fund and receive a greater price per share for that sale than they would if the fund shares had been valued at an NAV based on up-to-date information. Selling market timers, just like purchasing market timers, disproportionately deplete the pooled assets of the fund's investors. In both scenarios, the parties harmed by market timing are those who *held* their shares while *others* purchased and/or sold.[6]

The effects of market timing on long-term holders are enormous in the aggregate. Studies have confirmed that market timing costs *non-trading* shareholders between *$5 and $10 billion* each year.[7] The mutual fund industry's

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[6] Richard L. Levine, Yvonne Cristovici & Richard A. Jacobsen, *Mutual Fund Market Timing*, 52 Fed. Law. 28, 30 (Jan. 2005) ("market timing can be harmful to long-term investors because it dilutes gains (given that a market-timer's strategy is to buy at a NAV that undervalues the fund and to sell at a NAV that overvalues the fund)").

[7] *See* United States Government Accountability Office, *Mutual Fund Trading Abuses: Lessons Can Be Learned from SEC Not Having Detected Violations at an Earlier Stage* 4-5 (Apr. 2005), *available at* www.gao.gov/new.items/d05313.pdf. *See also, e.g.*, Jennifer Barrett, "Inexcusable," MSNBC.com, Nov. 11, 2003 (interview with John Bogle, founder and former CEO of the Vanguard Group, estimating market-timing dilution to cost investors $5 to $10 billion per year), *available at* http://www.msnbc.com/id/3403565/site/newsweek; Eric Zitzewitz, *Who*

main trade organization has acknowledged that "the discovery of trading abuses involving mutual funds . . . put at risk the reputation of the entire fund industry," "shook the industry to its core," and "triggered a degree of Congressional oversight of mutual funds rarely seen in the industry's history."[8] Many cases arising from that scandal have been consolidated in a multidistrict proceeding currently pending before three district judges. *See In re Mutual Funds Inv. Litig.*, 384 F. Supp. 2d 845 (D. Md. 2005).

b. A significant portion of the respondent funds' portfolios consists of foreign securities that are readily susceptible to market timing. Petitioners allege that respondents knew, or should have known, of the existence of market timing, and that they acted negligently[9] or recklessly[10] by failing to adopt procedures that would have prevented petitioners' investments from being diluted by market timing.[11] Petitioners alleged, for example, that respondents should have made pricing adjustments based on correlations between movements in the U.S. and foreign mar-

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Cares About Shareholders' Arbitrage-Proofing Mutual Funds, 19 J.L. Econ & Org. 245, 260 (2003) ("total annualized dilution in the first three quarters of 2001 can be estimated at $4.9 billion per year").

[8] Investment Company Institute, Trading Abuse Reforms & Actions, *available at* www.ici.org/issues/timing.

[9] *See* JA 181-82, 186 (¶¶ 56, 69) (*Potter*), 205 (¶ 56) (*Kircher*), 230 (¶ 60) (*Parthasarathy*), 255-56 (¶ 49) (*Dudley I*), 273-74 (¶ 49) (*Dudley II*), 290-91 (¶ 49) (*Vogeler*), 307 (¶ 49) (*Jackson*), 326-27 (¶ 62) (*Spurgeon*) (breach of fiduciary duties).

[10] *See* JA 183, 187-88 (¶¶ 60, 73) (*Potter*), 206-07 (¶ 60) (*Kircher*), 231-32 (¶ 64) (*Parthasarathy*), 257-58 (¶ 54) (*Dudley I*), 275-76 (¶ 54) (*Dudley II*), 292-93 (¶ 54) (*Vogeler*), 308-09 (¶ 53) (*Jackson*), 324 (¶¶ 56-57) (*Spurgeon*).

[11] Petitioner Spurgeon also alleged violations of several provisions of the California Business & Profession Code (Count IV). *See* JA 328-29 (¶¶ 67, 69, 73).

kets.[12] Petitioners' claims are based on negligence and recklessness, and do not allege fraud.

Each of petitioners' complaints defined the class to include holders of the relevant securities. The *Kircher* complaint is typical, limiting the class to "all persons in the United States who have owned shares of [the fund] for more than fourteen days from the date of purchase to the date of sale (redemption) or exchange."[13] The *Spurgeon* complaint took the additional step of explicitly excluding from the class "any claims based upon [the fund's] conduct in connection with Plaintiff's or any class member's purchase or sale of any" security. JA 319 (¶ 40). That exclusion is implicit in the negligence and recklessness claims of the other complaints because only a holder may experience damage from market timing.

3. In each of petitioners' cases, the named respondents filed notices of removal to the United States District Court for the Southern District of Illinois, arguing that the cases were subject to removal because they were preempted by SLUSA. Respondents' notices of removal relied on SLUSA's intertwined preemption and removal provisions, § 77p(b)-(c), as well as the general removal

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[12] *See* JA 170-71, 174-75 (¶¶ 17, 32-33) (*Potter*), 193-94, 197-98 (¶¶ 17, 32-33) (*Kircher*), 219, 222-23 (¶¶ 22, 37-38) (*Parthasarathy*), 245, 249-50 (¶¶ 13, 28-29) (*Dudley I*), 263, 267-68 (¶¶ 13, 28-29) (*Dudley II*), 280, 284-85 (¶¶ 13, 28-29) (*Vogeler*), 297, 300-02 (¶¶ 13, 28-29) (*Jackson*), 316-17 (¶¶ 31-32) (*Spurgeon*)

[13] JA 200-01 (¶ 41) (*Kircher*), *see* JA 177-78 (¶ 41) (*Potter*) (same), 226 (¶ 46) (*Parthasarathy*) (same), 252 (¶ 37) (*Dudley I*) (alleging "held" instead of "owned"), 270 (¶ 37) (*Dudley II*) (same), 287 (¶ 37) (*Vogeler*) (alleging "held" instead of "owned"), 303-04 (¶ 37) (*Jackson*) (alleging "held" instead of "owned" and omitting "from the date of purchase to the date of sale (redemption) or exchange"), 319 (¶ 39) (*Spurgeon*) (defining plaintiff class as "all persons in the United States who, through their ownership of [the fund's] products, held units of any [fund] sub-account invested in mutual funds which included foreign securities in their portfolios and which experienced market timing trading activity").

statute, 28 U.S.C. § 1441.[14] In *Kircher*, for example, the removal notice argued that SLUSA makes the "federal courts the exclusive venue for 'covered class actions' alleging fraud in connection with the purchase or sale of 'covered securities,'" thus basing removability under § 77p(c) on the satisfaction of each of the preemption factors set out in § 77p(b).[15] The notices also challenged petitioners' pleading of their state-law negligence and recklessness claims by characterizing them as "in essence" alleging fraud or the use of a manipulative device and then asserting that those claims were "preempted . . . notwithstanding [petitioners'] attempt to artfully plead their securities class action claims as state-law claims."[16]

Petitioners moved to remand to state court for lack of subject-matter jurisdiction.[17] The district judges assigned to petitioners' various cases remanded all of them back to

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[14] *See* JA 346-57 (*Kircher*), 360-61 (*Potter*), 377-89 (*Dudley I*), 394-406 (*Dudley II*), 409-12 (*Jackson*); *see also* JA 332-33 (*Parthasarathy*) (arguing that removal is proper under § 1441 because SLUSA creates a federal question), 370-71 (*Vogeler*) (relying only on § 1441), 418 (*Spurgeon*) (relying only on § 1441)

[15] JA 347 (*Kircher*)

[16] JA 348-50, 353-54 (*Kircher*), *accord* JA 360-61 (*Potter*) (arguing that removal was proper under SLUSA because petitioners' claims were "'in connection with' the purchase or sale of a covered security"), 385 (*Dudley I*) ("Plaintiffs' claims fall squarely within the four corners of SLUSA and, therefore, are preempted . . . For these reasons, removal under SLUSA is proper . . ."), 402 (*Dudley II*) (same), *see also* JA 371 (*Vogeler*) (stating that petitioners' claims are "in connection with the purchase or sale of securities, and therefore are removable under [SLUSA]"), 410 (*Jackson*) (stating that removal was proper under SLUSA because plaintiffs alleged "misrepresentations or omissions" and that "[respondents] used . . . a manipulative or deceptive device or contrivance in connection with the purchase or sale of covered securities"), 425-31 (*Spurgeon*) (arguing that removal was proper because SLUSA completely preempted petitioners' claims)

[17] In *Spurgeon*, the district court *sua sponte* ordered briefing on the remand issue, *see* JA 83 (Docket Entry 7), and, in *Vogeler*, the court remanded *sua sponte* without briefing, *see* JA 63-64 (Docket Entry 28)

state court, expressly holding in each case that the court "lacks subject matter jurisdiction."[18]

In all eight cases consolidated for this appeal, the district court judges individually recognized that SLUSA's "in connection with" language derives from § 10(b) of the 1934 Act and SEC Rule 10b-5. They also held, in turn, that a claim could be preempted under SLUSA only if that claim satisfied the "in connection with" requirement of § 10(b) of the 1934 Act and SEC Rule 10b-5. Each individual judge then explained that petitioners' claims were not actionable under § 10(b) and Rule 10b-5 because they brought their claims as holders of securities and their claims did not arise "in connection with the purchase or sale of a covered security" (§ 77p(b)(1)-(2)) as required by SLUSA's preemption provision. Accordingly, each district judge found that petitioners' state-law claims were not preempted.[19] For that reason, they did not address whether petitioners' state-law claims were also outside SLUSA's preemptive ambit because they did not involve allegations of misstatements or omissions of material fact, *i.e.*, fraud.

Because the claims did not fall within the preemption provision, the courts concluded, they were not removable under SLUSA and therefore were outside the courts' subject-matter jurisdiction.[20] As the district court in

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[18] Pet. App. 27a (*Kircher*) ("Because the Court lacks subject matter jurisdiction [over plaintiff's claims], the Court **REMANDS** this action" to state court), 30a (*Dudley I & II*), 40a (*Parthasarathy*), 46a (*Potter*), 51a (*Vogeler*), 57a (*Jackson*), 64a (*Spurgeon*).

[19] *See, e.g.*: Pet. App. 26a-27a (*Kircher*), 30a (*Dudley I & II*) ("Only *holders* of fund shares have the dilution of ownership interests and voting rights claims asserted in the complaints"), 40a (*Parthasarathy*) (agreeing that the "'complaint alleges dilution claims that only a holder of securities can bring'") (quoting *Bradfisch v. Templeton Funds, Inc.*, Case No. 03-CV-0760-MJR, slip op. at 6 (S.D. Ill. Jan. 23, 2004)), 44a-45a (*Potter*) (same), 50a-51a (*Vogeler*) (same), 56a-57a (*Jackson*) (same), 61a (*Spurgeon*) (stating that "SLUSA does not preempt" claims by "a *holder* of securities").

[20] Each of the district courts also rejected the argument that petitioners' state-law claims could be removed under 28 U.S.C. § 1441

Kircher put it, "SLUSA does not permit removal of Plaintiffs' claims" because petitioners' claims were not preempted by SLUSA.[21] Accordingly, the district courts remanded all eight cases to state court for a lack of subject-matter jurisdiction.[22]

4. On respondents' appeal of the remand order in *Kircher*, the Seventh Circuit ordered the respondent mutual fund to show cause why its appeal should not be dismissed for lack of jurisdiction under 28 U.S.C. § 1447(d), which precludes appellate review of remand orders based on a district court's conclusion that it lacked subject-matter jurisdiction. The court of appeals then held that it had jurisdiction to review the district court's remand order. *See* Pet. App. 15a-16a.

The court of appeals noted that § 1447(d) prohibits appellate review of an order remanding a case to state court on a ground listed in § 1447(c), which provides that a case must be remanded if the court determines that it lacks subject-matter jurisdiction. The court acknowledged that the district court expressly based its remand on the conclusion that, because SLUSA does not preempt petitioners' market-timing holder claims, "'the Court lacks subject matter jurisdiction.'" *id.* at 12a (quoting *Kircher* remand order, reproduced at Pet. App. 27a). The court of appeals did not accept that explanation, however. *See id.* at 13a. Instead, despite the district court's express statements to the contrary, the court of appeals characterized the district court opinion as holding that removal was "proper,"

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on the ground that they involved a substantial federal question or satisfied the diversity jurisdiction requirements. *See* Pet. App. 27a (*Kircher*), 30a (*Dudley I & II*), 34a-38a, 40a (*Parthasarathy*), 45a-46a (*Potter*), 51a (*Vogeler*), 57a (*Jackson*), 59a-60a (*Spurgeon*). Those holdings are not at issue here.

[21] Pet. App. 26a-27a (*Kircher*), *see also id.* at 30a (*Dudley I & II*), 39a-40a (*Parthasarathy*), 44a-45a (*Potter*), 50a-51a (*Vogeler*), 56a-57a (*Jackson*), 60a-61a (*Spurgeon*).

[22] *See* Pet. App. 27a (*Kircher*), 30a (*Dudley I & II*), 40a (*Parthasarathy*), 46a (*Potter*), 51a (*Vogeler*), 57a (*Jackson*), 64a (*Spurgeon*).

but that remand was required under § 77p(d)(4) because § 77p(b) did not preempt the claims. *Id.* at 13a-14a.

In concluding that an order remanding a claim on the ground that it is not preempted under SLUSA is not based on a lack of subject-matter jurisdiction, the court of appeals opined that SLUSA authorizes removal of *all* "covered class actions" – that is, all class actions that seek damages on behalf of more than 50 investors, *see* § 77p(f)(2)(A). Pet. App. 13a-14a. The court failed to address Kircher's argument that, because the removal provision in § 77p(c) applies only to those actions meeting SLUSA's preemption criteria "as set forth in subsection (b)," an action may be removed under SLUSA *only if* that action is preempted by SLUSA. Instead, the court held that the only condition for removal is that the lawsuit involve a "covered class action," and it is only after a suit has been removed under SLUSA that a district court must make the "substantive decision" whether the suit is preempted by § 77p(b). *Id.* at 14a. Thus, the court concluded, because the determination whether the suit is preempted is a substantive one that occurs only after removal has been found appropriate, a remand following a determination that the suit is not preempted is not based on a lack of jurisdiction; rather, it is based on a substantive determination that SLUSA does not preempt the claims. For those reasons, the court concluded that § 1447(d) did not prohibit appellate review of the remand order. *See id.* at 17a.

The court of appeals further justified its conclusion that the remand order was appealable by explaining that, if it were otherwise, "a major substantive issue in the case [would] escape review." *Id.* at 15a. According to the court, under SLUSA, state judges are incapable of determining whether a claim is preempted by SLUSA; rather, the court stated, SLUSA requires that the preemption determination "be made by the federal rather than the state judiciary." *Id.* Thus, unlike a "[n]ormal" remand order, which "leave[s] all substantive issues open to plenary resolution in the state court," "it is now or never for appel-

late review of the question" whether a state-law action is preempted under SLUSA. *Id.*

5. Having determined that it could exercise appellate jurisdiction over the district court's remand order in *Kircher*, the court of appeals issued orders declaring that appellate jurisdiction was proper in the other seven cases, and it subsequently consolidated all eight cases. The court then reversed the district courts' remand orders in all eight cases and remanded the cases with instructions to dismiss the state-law claims as preempted under SLUSA.

The court began by explaining that each of the class actions was a covered class action under SLUSA and that each involved covered securities. *See* Pet. App. 4a. It then turned to the question whether petitioners' actions alleged fraud or manipulation "in connection with" the purchase or sale of those securities.

The court explained that the "in connection with" language in SLUSA "has the same scope as its antecedent in Rule 10b-5." *Id.* at 5a. The court noted that in *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975), this Court held that an investor who neither purchases nor sells securities cannot bring a cause of action under § 10(b) and Rule 10b-5. The court concluded that, even if SLUSA's "in connection with" language incorporates *Blue Chip Stamps*' holding, all of the actions except *Spurgeon* were preempted. That was because, the court explained, those complaints defined the class as including investors who held shares of a mutual fund between two dates. According to the court, these actions had to be dismissed under SLUSA, because "some of the investors who held shares during the class period must have purchased their interest . . . during that time; others . . . undoubtedly sold some or all of their investment during the window." Pet. App. 6a. In so ruling, the court stated that it perceived petitioners' suits to be seeking recovery only for respondents' deceit or manipulation, and not for losses resulting from respondents' mismanagement of the fund, despite petitioners' consistent position that they were alleging

only claims of negligent and reckless mismanagement. *See id.* Because, in the court's view, all of the class actions alleged deceit or manipulation in connection with the purchase or sale of a security, the court concluded that SLUSA preempted the claims. *See id.* at 9a.

6. This Court granted certiorari in this case limited to Question 1 in the petition. That question is whether the court of appeals erred in holding that the district courts' remand orders are reviewable on appeal. The second question presented in the certiorari petition, which concerns the court of appeals' second holding that SLUSA preempts petitioners' claims, is before the Court in *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, No. 04-1371 (argued and submitted Jan. 18, 2006), on review of the Second Circuit's conclusion (which is contrary to the Seventh Circuit's decision in this case) that SLUSA does *not* generally preempt holder claims because those claims are not "in connection with the purchase or sale" of securities.

SUMMARY OF ARGUMENT

Section 1447(d) prohibits appellate review of a district court order remanding a case to state court if the district court bases the remand on its determination that it lacks subject-matter jurisdiction, regardless of whether that jurisdictional determination is "erroneous or not." *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 343 (1976). That absolute bar on review of such remand orders has a pedigree of more than a century, and it applies to cases, such as this one, removed under a provision other than the general removal provision, 28 U.S.C. § 1441. In each of the cases under review, the district court expressly remanded based on its conclusion that it lacked subject-matter jurisdiction. Those orders therefore are not reviewable.

Even if, contrary to this Court's precedents, it were proper for the court of appeals to second-guess the district courts' conclusions that they lacked subject-matter jurisdiction, the district courts properly determined that whether a claim is preempted under SLUSA is a question of subject-matter jurisdiction. SLUSA confers removal

jurisdiction only over those claims that meet the preemption criteria "as set forth in subsection (b)," SLUSA's preemption provision. 15 U.S.C. § 77p(c). By cross-referencing SLUSA's preemption provision, the plain language of SLUSA's removal provision provides that a class action cannot be removed unless that action satisfies SLUSA's preemption provision. Without that cross-reference, the federal courts would not have subject-matter jurisdiction over the suit, because a federal preemption defense generally does not confer subject-matter jurisdiction for removal purposes. The legislative history confirms that Congress intended to limit removal only to those actions that are preempted by SLUSA.

There is no merit to the court of appeals' conclusion that SLUSA preemption does not bear directly on the district court's subject-matter jurisdiction, but rather is a "substantive decision" that Congress authorized the court to make after it assumed jurisdiction over the removed case. That conclusion simply cannot be reconciled with SLUSA's plain text and legislative history, both of which make clear that preemption is a threshold prerequisite for the exercise of removal jurisdiction under SLUSA.

Moreover, the court of appeals committed two errors in concluding that petitioners' claims are preempted by SLUSA. First, the court of appeals erroneously concluded that petitioners' holder claims raise allegations "in connection with the purchase or sale" of securities within the meaning of § 77p(b). As correctly explained by respondent in *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, No. 04-1371, in private securities litigation under § 10(b) and Rule 10b-5, the phrase "in connection with the purchase or sale" has a settled judicial interpretation: A private party does not assert a claim "in connection with the purchase or sale of any security" within the meaning of § 10(b) and Rule 10b-5 unless that party avers that the defendant's act or omission was in connection with her own purchase or sale. *See Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 730-31, 749 (1975). Congress incorporated that interpretation of § 10(b) and Rule 10b-5

when it used that same language in SLUSA. Second, the court of appeals erroneously concluded that petitioners' claims are preempted by SLUSA because those claims do not "alleg[e] . . . an untrue statement or omission of a material fact" or "that the defendant used or employed any manipulative or deceptive device or contrivance." 15 U.S.C. § 77p(b). Instead, petitioners allege that respondents acted negligently and recklessly by failing to follow practices that would protect petitioners' assets from the dilution in value caused by market timing. Accordingly, because petitioners' claims fall outside the ambit of SLUSA preemption in § 77p(b), the district court's remand to state court was appropriate.

Permitting the court of appeals' decision to stand would directly undermine Congress's purpose in prohibiting review of remand orders: to avoid burdening plaintiffs who already have suffered delay through removal with the additional delay and costs associated with appeal. By concluding that appellate review was appropriate because it would generate "little cost in delay beyond" the delay already caused by the removal, the court of appeals impermissibly substituted its own policy view for that enacted into law by Congress in § 1447(d). Nor is there any basis for the court of appeals' assertion that appellate review is warranted because SLUSA requires that the federal judiciary resolve the preemption issue. A federal court *did* decide the SLUSA preemption question, but because Congress made a legislative judgment to make that determination part of the court's subject-matter jurisdiction, it falls squarely within § 1447(d)'s prohibition on reviewability.

ARGUMENT

I. DISTRICT COURT ORDERS REMANDING TO STATE COURT FOR LACK OF SUBJECT-MATTER JURISDICTION UNDER SLUSA ARE NOT REVIEWABLE ON APPEAL

A. By Long-Standing Statutory Prohibition, The General Rule Is That Courts Of Appeals Lack Jurisdiction To Consider Appeals Of District Court Orders Remanding A Removed Case Back To State Court

Since the earliest days of the Republic, "Congress has placed broad restrictions on the power of federal appellate courts to review district court orders remanding removed cases to state court." *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 127 (1995). That general prohibition provides the background rule that governs this case.

Under 28 U.S.C. § 1447(c), district courts have the authority to remand a case improperly removed from state court:

> A motion to remand the case on the basis of any defect other than subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.

28 U.S.C. § 1447(c).

Such remand orders, however, are not reviewable by an appellate court (with limited statutory exceptions not applicable here). That prohibition derives from § 1447(d), which is the "general statutory provision governing the reviewability of remand orders." *Things Remembered*, 516 U.S. at 127. Section 1447(d) provides:

> An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was re-

> moved pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

28 U.S.C. § 1447(d).[23] This general prohibition on appellate review is clear from not only the plain language of § 1447(d) but also the statutory history of that provision.

1. The text of § 1447(d) generally precludes appellate review of remand orders: "An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise." This Court has held, however, that "'§ 1447(d) must be read *in pari materia* with § 1447(c), so that only remands based on grounds specified in § 1447(c) are immune from review under § 1447(d).'" *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 711-12 (1996) (quoting *Things Remembered*, 516 U.S. at 127). Thus, notwithstanding the broad prohibitory language of § 1447(d), its scope is limited somewhat by the reach of § 1447(c).

As this Court has noted, § 1447(c) specifies two grounds for remand – "lack of subject matter jurisdiction or defects in removal procedure." *Id.* at 712.[24] "As long as a district court's remand is based on a timely raised defect in removal procedure or on lack of subject-matter jurisdiction – the grounds for remand recognized by § 1447(c) – a court of appeals lacks jurisdiction to entertain an appeal of the remand order under § 1447(d)." *Things Remembered*, 516 U.S. at 127-28. On the other hand, the Court has held that remand orders based on grounds *other* than those mentioned in § 1447(c) are not affected by § 1447(d)'s prohibition on appellate review. *See Quackenbush*, 517 U.S. 706 (remand based on abstention); *Thermtron Products*,

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[23] Section 1443 of Title 28 provides for the removal of civil rights cases. In a few other statutes, Congress has likewise excepted certain other remand orders from § 1447(d)'s general non-reviewability prohibition. *See infra* pp. 29-30.

[24] In 1996, Congress amended § 1447(c) by replacing the above-referenced language, "any defect in removal procedure" (28 U.S.C. § 1447(c) (1994)), with the broader, currently effective language "any defect other than subject matter jurisdiction." *See infra* note 43.

Inc. v. Hermansdorfer, 423 U.S. 336 (1976) (remand based on overcrowded district court docket). The Court has made clear, however, that those limited exceptions "neither disturb nor take issue with the well-established general rule that § 1447(d) and its predecessors were intended to forbid review by appeal or extraordinary writ of any order remanding a case on the grounds permitted by the statute." *Thermtron*, 423 U.S. at 351-52.

2. The general rules now codified in § 1447(c) and (d) have long been mandated by Congress. Except for a short period between 1875 and 1887, remand orders for lack of subject-matter jurisdiction or defects in removal have been unreviewable on appeal. *See United States v. Rice*, 327 U.S. 742, 749 (1946) ("save for a brief interval under § 5 of the Act of 1875, . . . an order of remand was not appealable"). In *Thermtron*, this Court traced the history of the predecessors to § 1447(c) and (d). *See* 423 U.S. at 346-48.

Before 1875, orders remanding a removed case were not reviewable by appeal or writ of error because they were not final judgments. *See id.* at 346 (citing *Railroad Co. v. Wiswall*, 90 U.S. (23 Wall.) 507 (1875)).[25] In the Judiciary Act of 1875, Congress authorized trial courts to remand a removed action (or to dismiss an action filed in federal court) where jurisdiction was lacking, and expressly provided that an order of the "circuit court dismissing or remanding said cause to the State court shall be reviewable by the Supreme Court on writ of error or appeal." Ch. 137, § 5, 18 Stat. 470, 472; *see Thermtron*, 423 U.S. at 346

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[25] Prior to *Wiswall*, this Court reviewed remand orders on several occasions without addressing whether it had jurisdiction to do so. *See, e.g., Gardner v. Brown*, 88 U.S. (21 Wall.) 36 (1875); *McKee v. Rains*, 77 U.S. (10 Wall.) 22 (1870); *Bushnell v. Kennedy*, 76 U.S. (9 Wall.) 387 (1870); *Mayor of Nashville v. Cooper*, 73 U.S. (6 Wall.) 247 (1868); *West v. Aurora City*, 73 U.S. (6 Wall.) 139 (1868); *Green v. Custard*, 64 U.S. (23 How.) 484 (1860); *Wood v. Davis*, 59 U.S. (18 How.) 467 (1856). However, "when questions of jurisdiction have been passed on in prior decisions *sub silentio*, this Court has never considered itself bound when a subsequent case finally brings the jurisdictional issue." *Hagans v. Lavine*, 415 U.S. 528, 534 n.5 (1974).

& n.10.[26] That provision for review of remand orders, however, was short-lived. In 1887, apparently in response to severe docket congestion resulting from such review, Congress repealed the 1875 review provision and provided instead that "no appeal or writ of error from the decision of the circuit court so remanding such cause shall be allowed." Act of Mar. 3, 1887, ch. 373, §§ 1, 6, 24 Stat. 552, 553, 555; *see Thermtron*, 423 U.S. at 346-47 & n.11. *See generally* Rhonda Wasserman, *Rethinking Review of Remands: Proposed Amendments to the Federal Removal Statute*, 43 Emory L.J. 83, 95-99 (1994).

The 1887 Act contained the "roots" of the provision now codified in § 1447(d), and from those roots have sprung numerous decisions of this Court and statutory recodifications by Congress. *Thermtron*, 423 U.S. at 346. This Court remarked on the breadth of the 1887 Act's prohibition on review of remand orders, holding that it "has relation to removals generally – those for prejudice or local influence, as well as those for other causes – and the prohibition has no words of limitation. . . . Its language is broad enough to cover all cases, and such was evidently the purpose of congress." *Morey v. Lockhart*, 123 U.S. 56, 58 (1887). This Court repeatedly reaffirmed the principle announced in *Morey*, continuing to "broadly construe[]" that provision as "prohibiting review of an order of remand, directly or indirectly, by any proceeding." *Gay v. Ruff*, 292 U.S. 25, 29 (1934).[27] In 1911, Congress reenacted the 1887 prohibition on appellate review of remand

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[26] At that time, the district and circuit courts had original jurisdiction over different types of matters. *See generally* Benjamin Curtis, *Jurisdiction, Practice, and Peculiar Jurisprudence of the Courts of the United States* (2d rev. ed. 1896). The federal courts of appeals were not created until 1891. *See* Act of Mar. 3, 1891, ch. 517, 26 Stat. 826.

[27] *See also German Nat'l Bank v. Speckert*, 181 U.S. 405, 406 (1901); *Missouri Pac. Ry. Co. v. Fitzgerald*, 160 U.S. 556, 581-82 (1896); *Chicago, St. P., M. & O. Ry. Co. v. Roberts*, 141 U.S. 690, 694 (1891); *Ex parte Pennsylvania Co.*, 137 U.S. 451, 453-54 (1890) (1887 Act bars *mandamus* challenging remand order); *Gurnee v. Patrick County*, 137 U.S. 141, 143 (1890); *Richmond & D.R.R. v. Thouron*, 134 U.S. 45, 46 (1890); *Sherman v. Grinnell*, 123 U.S. 679, 679-80 (1887).

orders based on a lack of jurisdiction. *See* Judicial Code of 1911, Act of Mar. 3, 1911, ch. 231, § 28, 36 Stat. 1087, 1094-95. *See also Employers Reinsurance Corp. v. Bryant*, 299 U.S. 374, 380 (1937); *Thermtron*, 423 U.S. at 347-48. Thus, in 1946, the Court observed that "the practice in removal cases was, as it had been established from the beginning, save for a brief interval under § 5 of the Act of 1875, that an order of remand was not appealable." *Rice*, 327 U.S. at 749.[28]

Against that virtually uniform history generally prohibiting review of remand orders, Congress enacted 28 U.S.C. § 1447 in 1948. *See* Act of June 25, 1948, ch. 646, § 1, 62 Stat. 869, 939. Because of an oversight, the original § 1447 did not prohibit appellate review of remand orders. That omission was soon corrected in 1949 when Congress added § 1447(d), which provided then as it does now: "An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise."[29] Act of May 24, 1949, ch. 139, § 84(b), 63 Stat. 89, 102. As this Court has explained, "[t]he plain intent of Congress, which was accomplished with the 1949 amendment, was to recodify the pre-1948 law without material change." *Thermtron*, 423 U.S. at 350 n.15; *see also* H.R. Rep. No. 81-352 (1949) (stating that § 1447(d) was added "to remove any doubt that the former law as to the finality of an order of remand to a State court is continued"), *reprinted in* 1949 U.S.C.C.A.N. 1254, 1268.

Accordingly, under the plain language of § 1447(d) and the history behind that provision, a district court's order based on a ground specified in § 1447(c) – lack of "subject matter jurisdiction" or "any defect other than subject matter jurisdiction" – is unreviewable.

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[28] The Court likewise held "that an order remanding a cause which is subject to the prohibition against appeals of [the 1887 Act] cannot be reviewed by mandamus." *Rice*, 327 U.S. at 751.

[29] In 1964, Congress added to § 1447(d) the provision permitting appellate review of remand orders in civil rights cases. *See* Civil Rights Act of 1964, Pub. L. No. 88-352, Tit. IX, § 901, 78 Stat. 241, 266.

B. The District Courts' Remand Orders Below Were Expressly Based On Lack Of Subject-Matter Jurisdiction And Are Therefore Unreviewable

Each of the eight district court orders (including the *Kircher* order reviewed by the court of appeals) based remand on an express finding that "the Court lacks subject matter jurisdiction."[30] Under this Court's precedents, those findings are dispositive and the remand orders issued pursuant to those findings are unreviewable.[31] The court of appeals' effort to evade this Court's precedent and to mischaracterize the district courts' actions should be rejected.

1. The proper application of the general rule of § 1447(d) compels reversal of the Seventh Circuit's judgment for two reasons. First, the district courts' characterizations of their holdings are dispositive, and, second, even if those judgments are erroneous, appellate jurisdiction still does not obtain over the remand orders in this case. Well-established precedent supports both principles. "If a trial judge *purports* to remand a case on the ground that it was removed 'improvidently and without jurisdiction,' his order is not subject to challenge in the court of appeals by appeal, by mandamus, or otherwise." *Thermtron*, 423 U.S. at 343 (emphasis added) (quoting 1949 version of § 1447(c)).

This Court has long stressed that "the issue of removability is closed if the federal district court refuses to assume jurisdiction and remands the cause." *Metropolitan Cas. Ins. Co. v. Stevens*, 312 U.S. 563, 568 (1941); *id.*

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[30] Pet App 27a (*Kircher*), *see also id.* at 30a (*Dudley I & II*), 40a (*Parthasarathy*), 46a (*Potter*), 51a (*Vogeler*), 57a (*Jackson*), 61a (*Spurgeon*).

[31] Although the Court could decide the question presented solely on this ground, we explain in Part II, *infra*, why the district courts correctly concluded that they lacked subject-matter jurisdiction because SLUSA preemption is a question of subject-matter jurisdiction and petitioners' claims are not preempted by SLUSA.

("Section 28 of the Judicial Code [now § 1447(c)] precludes review of the remand order directly or indirectly after final judgment in the highest court of the state in which decision could be had.") (citations omitted). That prohibition on appellate review applies irrespective of the correctness of the district court's conclusion that jurisdiction is lacking: § 1447(d) "prohibits review of all remand orders issued pursuant to § 1447(c) *whether erroneous or not* and whether review is sought by appeal or by extraordinary writ. This has been the established rule under § 1447(d) and its predecessors stretching back to 1887." *Thermtron*, 423 U.S. at 343 (emphasis added).

Shortly after deciding *Thermtron*, this Court reaffirmed those core principles in *Gravitt v. Southwestern Bell Telephone Co.*, 430 U.S. 723 (1977) (per curiam). The defendant in *Gravitt* had removed a state-law tort suit based on diversity jurisdiction, alleging that it was a Missouri corporation. *See In re Southwestern Bell Tel. Co.*, 535 F.2d 859, 860 (5th Cir. 1976) (per curiam). Based on the defendant's pleadings in a previous, unrelated suit, however, the district court held that the defendant was judicially estopped under Texas law from claiming it was not a Texas citizen. It therefore remanded the case for lack of diversity because it had concluded that at least one plaintiff was also a Texas citizen. On petition for a writ of mandamus, the Fifth Circuit acknowledged the "general rule" that remand orders are unreviewable, but it read *Thermtron* to permit review of the district court's judicial estoppel decision, because that issue in and of itself was not jurisdictional and was therefore not covered by the remand grounds mentioned in § 1447(c). *See id.* ("Thus, the Court concluded [in *Thermtron*], if a district judge's reason for remanding a case is outside the grounds specified in § 1447(c), as Judge Hermansdorfer's was, the barrier to review in § 1447(d) is also inapplicable, and mandamus is a proper remedy to redress the illegal remand order.").

This Court summarily reversed the Fifth Circuit in a three-paragraph, *per curiam* opinion. It rejected the

premise that a district court order that allegedly "had employed erroneous principles in concluding that it was without jurisdiction" could be reviewed on appeal. *Gravitt*, 430 U.S. at 723. Instead, the Court expressly confirmed that "*Thermtron* did not question but reemphasized the rule that § 1447(c) remands are not reviewable." *Id.* at 724. Thus, because "[t]he District Court's remand order was plainly within the bounds of § 1447(c)," the Court concluded, it "was unreviewable by the Court of Appeals, by mandamus or otherwise." *Id.* at 723.

This Court has subsequently read *Gravitt* as holding that, "[w]here the order is based on one of the enumerated grounds, review is unavailable no matter how plain the legal error in ordering the remand." *Briscoe v. Bell*, 432 U.S. 404, 413 n.13 (1977) (citing *Gravitt*, 430 U.S. at 723); *see also Volvo of Am. Corp. v. Schwarzer*, 429 U.S. 1331, 1332 (1976) (Rehnquist, Circuit Justice) (concluding that § 1447(d) bars review of remand order based on lack of jurisdiction, even though "the District Court may have been wrong in its analysis").

2. To avoid those settled legal principles, the court of appeals engaged in a series of unpersuasive deflections of fact and law. The court acknowledged that the district court's remand order was expressly based on the conclusion that, "'[b]ecause the Court lacks subject matter jurisdiction, the Court REMANDS this action.'" Pet. App. 12a (quoting *Kircher* remand order). Under *Gravitt* and similar cases, once the court of appeals recognized that point, its job was at its end: the district court's remand for lack of subject-matter jurisdiction is unreviewable "whether erroneous or not." *Thermtron*, 423 U.S. at 343.[12]

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[12] Indeed, until this case, the Seventh Circuit had understood *Thermtron* to mean that, "[i]f the district court *announced* that its remand order was based on one of the grounds for remand recognized in § 1447(c) . . . then review was barred." *Adkins v. Illinois Cent. R.R.*, 326 F.3d 828, 831 (7th Cir. 2003) (emphasis added); *id.* ("The Court has made it clear, however, that the *Thermtron* holding was not an open-ended invitation to exercise appellate review over remand decisions.

Although the court of appeals cited *Gravitt*, *see* Pet. App. 12a-13a, it simply disregarded the holding of that case. *Cf. Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 510 (2001) (per curiam) ("[T]he Court of Appeals here recited these principles, but its application of them is nothing short of baffling."). In an attempted end run around the non-reviewability rule, the court of appeals inexplicably mischaracterized the district court's *Kircher* order by asserting that "[r]emoval of this suit was proper, the district judge held; that is why the court proceeded to the question how § 77p(b) affects the litigation." Pet. App. 14a. But the district court held no such thing. It examined the preemption criteria set forth in § 77p(b) only for the purpose of deciding whether removal jurisdiction existed under § 77p(c). *See id.* at 25a-27a. Finding that the claims in the *Kircher* complaint were not preempted because they alleged holder claims that were not "in connection with the purchase or sale of a covered security" (§ 77p(b)), the district court granted the motion to remand "[b]ecause the Court lacks subject matter jurisdiction." Pet. App. 27a.[11]

Beyond mischaracterizing the district court's holding, the court of appeals stated that it simply disagreed with the district court's jurisdictional analysis that, under SLUSA's provision authorizing removal jurisdiction, the question of preemption is inseparable from the question of removal jurisdiction. *See id.* at 14a ("That [*i.e.*, SLUSA preemption] is not the 'lack of subject-matter jurisdiction' that authorizes a remand."). But a disagreement between

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To the contrary, it has three times cautioned that the *Thermtron* exception to § 1447(d) is to be narrowly construed.") (citing *Gravitt*, *Things Remembered*, and *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343 (1988)).

[11] Although a court of appeals might in some cases have to interpret an unclear or ambiguous order to glean the true ground on which remand was based, *see, e.g.*, *Adkins*, 326 F.3d at 834 ("reasonable people might disagree over the best reading of the district court's remand order"), here the district courts' orders could not have been clearer in stating that the cases were remanded for lack of subject-matter jurisdiction.

the court of appeals and the district court over whether the district court properly understood the limits on its own subject-matter jurisdiction does not make the district court's order reviewable under § 1447(d). "Otherwise, the rule means nothing at all, because appeals will be taken and sustained in those cases where the district court made a mistake, and rejected in cases where the district court was correct. Even if the district court was wrong that it lacked jurisdiction over the claims that it remanded, the remand would nevertheless be jurisdictional." *Adkins*, 326 F.3d at 834; *id.* ("[T]he only important point is that the district court did not *think* that [anything] saved its jurisdiction.").[11]

Accordingly, whether or not the district courts erred in concluding that SLUSA makes federal-question jurisdiction dependent on whether the state claims are preempted – and they did not err, as explained below in Part II – § 1447(d) plainly bars review of the district courts' remand orders here.

C. SLUSA's Removal Provision Does Not Affect § 1447(d)'s General Prohibition On Appellate Review Of Remand Orders

The general prohibition on appellate review in § 1447(d) applies notwithstanding the presence of a removal provision in SLUSA, § 77p(d). Congress is presumed to be "'aware of the universality of th[e] practice' of denying appellate review of remand orders when Congress creates a new ground for removal." *Things Remembered*, 516 U.S. at 128 (quoting *Rice*, 327 U.S. at 752) (alteration in

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[11] This is not a case where the district court absurdly applied a label of "subject-matter jurisdiction" to a plainly non-jurisdictional remand. *Cf. Thermtron*, 423 U.S. at 343-44 (holding remand based on overcrowded district court docket not jurisdictional; "Neither the propriety of the removal nor the jurisdiction of the court was questioned by respondent in the slightest."). Even if such a patently unreasonable mislabeling could be reviewed, SLUSA's removal provision, all agree, goes to subject-matter jurisdiction. If review could be had on the mere assertion that the district court misinterpreted a jurisdictional statute, then § 1447(d) would be a nullity.

original). Accordingly, "[a]bsent a clear statutory command to the contrary," the prohibition in § 1447(d) on appellate review "applies 'not only to remand orders made in suits removed under [the general removal statute], but to orders of remand made in cases removed under *any other statutes*, as well.'" *Id.* (quoting *Rice*, 327 U.S. at 752) (alteration in original).

Applying these principles, this Court held in *Things Remembered* that § 1447(d) precluded appellate review of a remand order issued under 28 U.S.C. § 1452, which authorizes the removal of bankruptcy actions. The Court observed that there was "no express indication in § 1452" that it was intended to be "the exclusive provision governing removals and remands in bankruptcy," and there was no "reason to infer from § 1447(d) that Congress intended to exclude bankruptcy cases from its coverage." 516 U.S. at 129. While § 1452 contained its own remand provision, the Court held that "[t]here is no reason §§ 1447(d) and 1452 cannot comfortably coexist in the bankruptcy context." *Id.*

Here, there likewise is no indication that § 1447(d) excludes securities cases from its coverage. *See Harter Township v. Kernochan*, 103 U.S. 562, 566-67 (1881) (upholding removal of securities case). And nothing in SLUSA suggests that its removal provision is exempt from § 1447(d), let alone provides the requisite "clear statutory command" to that effect. *Things Remembered*, 516 U.S. at 128. To the contrary, when Congress has intended to carve out exceptions to § 1447(d), it has done so clearly and explicitly. For example, § 1447(d) itself excludes civil rights cases removed pursuant to § 1443 from its reach; two statutes give the Resolution Trust Corporation and the Federal Deposit Insurance Corporation the express right to appeal a remand order;[15] and another

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[15] *See* 12 U.S.C. § 1441a(*l*)(3)(C) (RTC "may appeal any order of remand entered by a United States district court"), *id.* § 1819(b)(2)(C) (FDIC "may appeal any order of remand entered by any United States district court").

permits the United States to appeal remand orders in cases involving the property of Indians.[36] In addition, the recent Class Action Fairness Act of 2005 ("CAFA") authorizes "an appeal from an order of a district court granting or denying a motion to remand a class action to the State court" "notwithstanding section 1447(d)."[37] (That Act expressly excludes securities class actions, and thus SLUSA, from its reach.[38]) Because SLUSA does not contain similar provisions, § 1447(d)'s prohibition on appellate review applies to district court orders remanding a case for lack of subject-matter jurisdiction under SLUSA.

Therefore, the court of appeals erred in exercising appellate jurisdiction over the district courts' remand orders, because their orders were based on those courts' conclusions that they lacked subject-matter jurisdiction under SLUSA over petitioners' cases.

II. SLUSA MAKES REMOVAL JURISDICTION DEPENDENT ON PREEMPTION

A. SLUSA's Removal Provision Creates Federal-Question Jurisdiction For State-Law Claims If And Only If SLUSA Preempts Them

The court of appeals also erred for a second reason: even if, contrary to this Court's precedent, it was proper for the court of appeals to second-guess the district courts' conclusions that they lacked subject-matter jurisdiction, preemption under SLUSA is a question of subject-matter jurisdiction.

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[36] *See* 25 U.S.C. § 487(d) ("the United States shall have the right to appeal from any order of remand" in a suit involving foreclosure or sale of "tribal land").

[37] Pub. L. No. 109-2, § 5(a), 119 Stat. 4, 12 (to be codified at 28 U.S.C. § 1453(c)(1)).

[38] CAFA does *not* apply to "any class action that solely involves . . . a claim . . . concerning a covered security as defined under section 16(f)(3) of the Securities Act of 1933 (15 U.S.C. 78p(f)(3)) and section 28(f)(5)(E) of the Securities Exchange Act of 1934 (15 U.S.C. 78bb(f)(5)(E))." *Id.* § 4(a)(2), 119 Stat. 11 (to be codified at 28 U.S.C. § 1332(d)(9)(A)), *accord id.* § 5(a), 119 Stat. 13 (to be codified at 28 U.S.C. § 1453(d)).

1. Petitioners alleged in their complaints only state-law causes of action challenging respondents' failure to take measures to prevent market-timing activities, which – because petitioners continued to hold rather than sell their mutual-fund shares – reduced the value of their holdings. *See* Pet. App. 10a ("plaintiffs filed suit in state court, invoking state law alone"). Ordinarily, a defense of federal preemption of state-law claims does *not* create original federal-question jurisdiction and thus does not provide a ground for removal. *See Caterpillar Inc. v. Williams*, 482 U.S. 386, 399 (1987). Under the well-pleaded complaint rule, federal preemption is an affirmative defense that must be assessed by the state court in which the action was filed. "[S]ince 1887 it has been settled law that a case may not be removed to federal court on the basis of a federal defense, including the defense of pre-emption." *Franchise Tax Bd. v. Construction Laborers Vacation Trust for Southern California*, 463 U.S. 1, 14 (1983); *see* Pet. App. 11a.[19]

Section 77p(c) provides an exception to the well-pleaded complaint rule because it authorizes removal based on a defense of federal preemption. Section 77p(c) permits removal of "[a]ny covered class action brought in any State court involving a covered security, as set forth in subsection (b) of this section." By its terms, § 77p(c) does not permit removal of all covered class actions. Rather, it

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[19] *See also, e.g., Gully v. First Nat'l Bank*, 299 U.S. 109, 112 (1936) ("[A] right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action"); *Taylor v. Anderson*, 234 U.S. 74, 75-76 (1914) ("[W]hether a case is one arising under the Constitution or a law or treaty of the United States, in the sense of the jurisdictional statute, must be determined from what necessarily appears in the plaintiff's statement of his own claim in the bill or declaration, unaided by anything alleged in anticipation of avoidance of defenses which it is thought the defendant may interpose.") (citation omitted); *Louisville & Nashville R.R. v. Mottley*, 211 U.S. 149, 152 (1908) ("Although such allegations show that very likely, in the course of the litigation, a question under the Constitution would arise, they do not show that the suit, that is, the plaintiff's original cause of action, arises under the Constitution.")

provides for removal of a covered class action if and only if it meets the preemption criteria "as set forth in subsection (b)." 15 U.S.C. § 77p(c). By cross-referencing SLUSA's preemption provision in subsection (b), the plain language of SLUSA's removal provision (§ 77p(c)) clearly mandates that a class action cannot be removed *unless* that action satisfies SLUSA's preemption provision. Thus, under § 77p(c)'s plain terms, the district court must determine whether the removed state-law claims are in fact preempted by subsection (b) as a prerequisite to determining whether the case is removable. "[W]here, as here, the statute's language is plain, the sole function of the courts is to enforce it according to its terms." *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989) (internal quotation marks omitted).

SLUSA's legislative history confirms that Congress deliberately crafted SLUSA's removal provision to confer subject-matter jurisdiction only over state actions preempted by SLUSA's preemption provision. Both the House and Senate reports state that § 77p(c) "provides that any class action *described in subsection (b)* that is brought in a State court shall be removable to Federal district court, and may be dismissed pursuant to the provisions of subsection (b)." H.R. Rep. No. 105-640, at 16 (emphasis added); S. Rep. No. 105-182, at 8 (1998) (same). The chairman of the SEC and one of its commissioners likewise explained in prepared testimony on the bill that SLUSA's removal provision "is coextensive with the preemption provision."[10]

Thus, as the Second Circuit has explained, "SLUSA only converts into federal claims those state claims that fall within its clear preemptive scope, thereby confining federal question jurisdiction under this statutory regime to a subset of securities fraud cases." *Spielman v. Merrill*

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[10] Prepared Testimony of The Honorable Arthur Levitt, Jr., SEC Chairman, and The Honorable Isaac C. Hunt, SEC Commissioner, Before the Subcomm. on Securities of the Senate Comm. on Banking, Housing, and Urban Affairs (Oct. 29, 1997), *available at* http://banking.senate.gov/97_10hrg/102997/witness/sec.htm

Lynch, Pierce, Fenner & Smith, Inc., 332 F.3d 116, 124 (2d Cir. 2003). If, as in this case, a district court "determines that the action is *not* a 'preempted class action' and, therefore, removal was improper, the district court lacks subject matter jurisdiction to further entertain the action." *Id.* at 125.

Respondents, through sets of counsel including counsel of record in this Court, undertook precisely the same analysis in their notices of removal. In *Kircher*, for example, respondents argued that petitioners' claims were "preempted" and, "[f]or th[is] reason[], removal under SLUSA [wa]s proper."[41] They also followed that analysis in opposing petitioners' motions to remand. In *Potter*, for example, respondents expressly opposed remand on the ground that the claims were removable because they were preempted, arguing that "SLUSA's *preemptive* provisions authorize removal." Opposition of Defendants Janus Investment Fund and Janus Capital Management, LLC to Motion to Remand at 5 (emphasis added) (*Potter*, Dist. Ct. Docket Entry 43).[42] Plainly, when they were not attempt-

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[41] JA 353-54 (*Kircher*), *accord* JA 360-61 (*Potter*) (arguing that removal was proper under SLUSA because petitioners' claims were "'in connection with' the purchase or sale of a covered security"); 385 (*Dudley I*) ("Plaintiffs' claims fall squarely within the four corners of SLUSA and, therefore, are preempted . . . For these reasons, removal under SLUSA is proper . . ."); 402 (*Dudley II*) (same); *see also* JA 371 (*Vogeler*) (stating that petitioners' claims are "in connection with the purchase or sale of securities, and therefore are removable . . . under [SLUSA]"); 410 (*Jackson*) (stating that removal was proper under SLUSA because plaintiffs alleged "misrepresentations or omissions" and that "[respondents] used . . . a manipulative or deceptive device or contrivance in connection with the purchase or sale of covered securities"); 425-31 (*Spurgeon*) (arguing that removal was proper because SLUSA completely preempted petitioners' claims).

[42] *See also, e.g.*, Artisan Defendants' Memorandum in Opposition to Plaintiffs' Motion to Remand at 16 ("Under SLUSA, if an action [meets all four of the preemption criteria] . . . the case is removable to federal court and subject to dismissal") (*Parthasarathy*, Dist. Ct. Docket Entry 50); Response to Plaintiff's Jurisdictional Memorandum at 1 ("[SLUSA] preemption has the 'force to provide removal jurisdiction'") (quoting *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 10 (2003)) (*Spurgeon*, Dist. Ct. Docket Entry 26); Defendants' Memorandum of

ing to read SLUSA in such a way as to permit reviewability of remand orders, respondents understood that removal jurisdiction depends on the satisfaction of SLUSA's preemption provision.[43]

2. That analysis of SLUSA is consistent with the Court's approach in the analogous context of complete preemption. The complete preemption doctrine, which this Court has crafted as a narrow exception to the well-pleaded complaint rule, holds that, "[w]hen the federal statute completely pre-empts the state-law cause of action, a claim which comes within the scope of that cause of action, even if pleaded in terms of state law, is in reality based on federal law. This claim is then removable under 28 U.S.C. § 1441(b), which authorizes any claim that 'arises under' federal law to be removed to federal court." *Beneficial Nat'l Bank*, 539 U.S. at 8; *see also Franchise Tax Bd.*, 463 U.S. at 24 ("[I]f a federal cause of action completely preempts a state cause of action any complaint that comes within the scope of the federal cause of action necessarily 'arises under' federal law.").

Law in Opposition to Plaintiffs' Motion to Remand at 2 ("SLUSA authorizes removal of any 'covered class action' based on 'the statutory or common law of any State,' alleging misrepresentation or manipulation in connection with the purchase or sale of 'covered securities.' 15 U.S.C. §§ 77p(c) and 78bb(f)(2)."); *Kircher*, Dist. Ct. Docket Entry 10).

[43] Even if a remand based on the determination that a claim is not preempted by SLUSA did not in fact concern subject-matter jurisdiction, it would nevertheless be unreviewable because it would be based on "any defect other than lack of subject matter jurisdiction." 28 U.S.C. § 1447(c). As the Eleventh Circuit has explained, a "defect" in removal exists when any of the "legal requisites" for removal set forth in the applicable removal statute are not satisfied. *Snapper, Inc. v. Redan*, 171 F.3d 1249, 1253 (11th Cir. 1999) (internal quotation marks omitted). By cross-referencing SLUSA's preemption provision, § 77p(c) makes preemption one of the legal requisites for removal. The removal of claims that do not satisfy this requirement is plainly defective from the outset. *See Williams v. AFC Enters., Inc.*, 389 F.3d 1185, 1190 (11th Cir. 2004) (stating that, even if a remand order under SLUSA "was not based upon a lack of subject matter jurisdiction, we would readily conclude that this removal order is one based upon a 'defect' within the meaning of 1447(c) and therefore one we cannot review").

Under the complete preemption doctrine, federal-question jurisdiction exists if and only if federal law completely displaces the state-law claims. In that context, therefore, the preemption decision is a question of subject-matter jurisdiction. It logically follows that a district court's order remanding a case because the claims are not subject to the complete preemption doctrine is also not reviewable, as the courts of appeals (including the Seventh Circuit) have uniformly held.[11]

SLUSA functions in the same way: it provides federal removal jurisdiction over state-law claims if and only if those state claims are preempted. The court of appeals simply got it backwards in determining that the district court had removal jurisdiction over any and all "covered class actions" and that the preemption question had noth-

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[11] *See, e.g., Gonzalez-Garcia v. Williamson Dickie Mfg. Co.*, 99 F.3d 490, 491-92 (1st Cir. 1996); *Spielman*, 332 F.3d at 124 (2d Cir.); *O'Neill v. Brannigan*, 54 Fed. Appx. 69, 72 (3d Cir. 2002); *Nutter v. Monongahela Power Co.*, 4 F.3d 319, 321 (4th Cir. 1993) ("Because complete preemption was the basis for the district court's jurisdiction, the court's findings regarding preemption and jurisdiction are indistinguishable. The preemption findings were merely subsidiary legal steps on the way to its determination that the case was not properly removed.") (internal quotation marks and alteration omitted); *Smith v. Texas Children's Hosp.*, 172 F.3d 923, 926 (5th Cir. 1999) ("[T]he district court's conclusion regarding the lack of complete preemption is insulated from appellate review by § 1447(d)."); *Anusbigian v. Trugreen/Chemlawn, Inc.*, 72 F.3d 1253, 1256-57 (6th Cir. 1996) ("[W]here a district court rejects a defendant's claim of complete federal preemption as a basis for removing a case to federal court, the court of appeals does not have jurisdiction to hear the appeal from a remand order."); *Rogers v. Tyson Foods, Inc.*, 308 F.3d 785, 790 (7th Cir. 2002) ("We accordingly conclude that removal of this action to federal court was improper, and we must reverse and remand this case to the district court with directions to remand the action to state court for lack of federal subject matter jurisdiction."); *Transit Cas. Co. v. Certain Underwriters at Lloyd's of London*, 119 F.3d 619, 624 (8th Cir. 1997) ("A remand based on lack of 'complete preemption' . . . is a remand required by 28 U.S.C. § 1447(c)."); (internal quotation marks omitted); *Lyons v. Alaska Teamsters Employer Serv. Corp.*, 188 F.3d 1170, 1173 (9th Cir. 1999) ("[T]he remand, while it considers the merits of the preemption defense, is not apart from the jurisdictional determination."); *Glasser v. Amalgamated Workers Union Local 88*, 806 F.2d 1539, 1540 (11th Cir. 1986).

ing to do with jurisdiction. As with this Court's complete preemption doctrine, federal jurisdiction under SLUSA attaches only to those covered class actions that SLUSA preempts. Thus, whether SLUSA preempts a removed claim is a threshold question of subject-matter jurisdiction that a district court must answer before it turns to the merits of the claim.

B. The Court Of Appeals' Interpretation Is Unsupported By The Statutory Text And This Court's Cases

1. The court of appeals concluded that SLUSA preemption is not a question of subject-matter jurisdiction for the district court but rather is "the substantive decision that Congress authorized it to make" after it assumed jurisdiction over the removed case. Pet. App. 14a. The court explained that a district court lacks subject-matter jurisdiction "only when Congress has not authorized the federal judiciary to resolve the sort of issue presented by the case." *Id.* at 13a (citing *Scarborough v. Principi*, 541 U.S. 401, 413-14 (2004), and *Kontrick v. Ryan*, 540 U.S. 443, 454-55 (2004)). According to the court, it was required to "distinguish between a decision that 'this court lacks adjudicatory competence' and a decision that 'the court has been authorized to do X and having done so should bow out.'" *Id.* at 14a. In the court's view, treating the SLUSA preemption question as one of subject-matter jurisdiction would mean that "every federal suit, having been decided on the merits, would be dismissed 'for lack of jurisdiction' because the court's job was finished." *Id.* The court of appeals' reasoning is deeply flawed.

First, the fact that courts are "authorize[d]" to resolve the SLUSA preemption issue stems from the "familiar law that a federal court always has jurisdiction to determine its own jurisdiction." *United States v. Ruiz*, 536 U.S. 622, 628 (2002). Section 77p(c) provides federal jurisdiction *only* over cases that are in fact preempted by § 77p(b). Thus, under SLUSA, a district court must resolve the "merits" of the preemption question to determine whether it has subject-matter jurisdiction over the claim.

Nothing in *Kontrick* or *Scarborough* suggests that the district courts' authority to resolve the preemption issue in ruling on motions to remand under SLUSA somehow meant that the courts' remand orders were not based on a lack of jurisdiction. On the contrary, *Scarborough* explains that the "label" subject-matter jurisdiction refers to statutory prescriptions "'delineating the classes of cases . . . falling within a court's adjudicatory authority.'" 541 U.S. at 413-14 (quoting *Kontrick*, 540 U.S. at 454-55). By conditioning removability on the satisfaction of the preemption criteria "as set forth in subsection (b)," § 77p(c) provides federal "adjudicatory authority" only for that class of cases satisfying the requirements for preemption under SLUSA.

If Congress had intended to authorize the removal of all "covered class actions," it would simply have enacted a statute providing that "any covered class action brought in any State court involving a covered security shall be removable." But that is not what Congress did. Instead, Congress expressly limited removal jurisdiction to only covered class actions that also meet the preemption requirements "set forth in subsection (b)." Although the court of appeals acknowledged that "[d]efendants removed this suit under § 77p(c)," Pet. App. 11a, it never analyzed the text of § 77p(c). Instead, the court asserted without any textual basis that SLUSA creates federal jurisdiction over *any* covered class action in which a defendant chooses to file a notice of removal, and that a district court's preemption ruling is not one of jurisdiction. *Id.* at 13a-14a ("Because . . . this is a 'covered class action[,]' . . . a federal judge is . . . authorized . . . to decide whether any court may entertain the litigation."). Congress, however, chose to permit removal *only* for those covered class actions that also meet the preemption requirements "set forth in subsection (b)." Accordingly, removal is appropriate only in those covered class actions that fall within

SLUSA's preemption provision, and the lower court's judicial revision of the statute should be rejected.[45]

Second, the court of appeals' decision is internally inconsistent. The court conceded that "[a] conclusion that a suit is not a 'covered class action' (say, because just 40 investors stand to recover damages) would imply that removal had been improper, and such a decision would come within § 1447(d)." *Id.* at 14a. Under SLUSA's removal provision, however, determining whether the suit sought to be removed is a "covered class action" is but one of three express conditions for removal laid out in § 77p(c). For a suit to be removable under § 77p(c), not only must it be a "covered class action," but it must also involve "a covered security" and meet the criteria for preemption "as set forth in subsection (b)." 15 U.S.C. § 77p(c). It is illogical to conclude that the failure to meet one of those prerequisites results in a lack of subject-matter jurisdiction, but failing to meet the other two conditions does not. Thus, the court's acknowledgment that jurisdiction would be lacking if the covered class action requirement in § 77p(c)

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[45] In opposing certiorari, respondents relied on the federal officer removal statute authorizing removal of a state-court civil action against a federal officer "for any act under color of such office." 28 U.S.C. § 1442(a)(1), *see* Brief in Opposition at 16-17 (filed Nov. 29, 2005) (citing, *inter alia*, *Jefferson County v. Acker*, 527 U.S. 423 (1999)). That statute upholds important federal sovereignty interests not present in SLUSA. The Court has interpreted it not to require the removing officer to prove a "clearly sustainable defense" but only a "colorable defense." *Acker*, 527 U.S. at 432 (internal quotation marks omitted). SLUSA, on the other hand, expressly bases removability on whether there is preemption *in fact* – not merely on whether that defense is colorable. The Court's interpretation of the federal officer removal statute also relied on what it viewed as the statutory purpose "to have the validity of the defense of official immunity tried in a federal court." *Id.* at 431 (internal quotation marks omitted). Similar concerns are not present here. In every case removed under SLUSA, a federal court determines the "validity" of the argument that the claims are preempted; that determination dictates whether the case was properly removed and subject to dismissal or improperly removed and subject to remand. In any event, *Acker* in no way purports to alter the rule that an order remanding for lack of subject-matter jurisdiction is unreviewable.

were not met demonstrates that jurisdiction likewise would be lacking if the claim did not involve a fraudulent misstatement, was in connection with the purchase or sale of a covered security, or met any other criteria for preemption.[46]

Third, in determining that appellate jurisdiction was proper, the court of appeals erroneously placed substantial reliance on § 77p(d)(4), which provides that, if a district court determines that an action removed from state court "may be maintained in State court pursuant to . . . subsection [(d)]," it must remand the action to state court. 15 U.S.C. § 77p(d)(4).[47] The court perceived that this provision is the basis for a remand if a district court determines that "§ 77p(b) does not thwart plaintiffs' claims," and that such remands are "not within § 1447(c) . . . , for a remand under § 77p(d)(4) comes at the end rather than the outset of federal adjudication." Pet. App. 12a, 13a.

The court erred in concluding that § 77p(d)(4) applies here at all. Although that provision does specifically require a remand, it does so only for certain state actions enumerated in "subsection [(d)]" – in particular, state claims involving tender offers, dissenters' rights, and suits brought by States or their pension plans that otherwise would meet the preemption criteria yet nevertheless are preserved from preemption by subsection (d) of § 77p. *See* 15 U.S.C. § 77p(d)(1)-(3); *see also supra* note 2 (discussing § 77p(d)). But this case does not involve any of the specific carve-outs in § 77p(d), so the remand provision of § 77p(d)(4) does not apply. That is the only sensible reading of "subsection" in § 77p(d)(4). *See Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 61 (2004) (observing that, under the ordinary "hierarchical scheme" of sub-

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[46] To the extent the court might have meant that the covered class action holding would be unreviewable, not because it was jurisdictional but rather because it qualified as "any defect other than lack of subject matter jurisdiction," § 1447(c), that logic would likewise extend to the full preemption analysis required under § 77p(b). *See supra* note 43.

[47] Section 77p(d) is set out in full at App., *infra*, 2a-3a, 17a-18a.

dividing statutes, "subsections" "start[ ] with (a)"). A district court's finding that a case is subject to preemption under § 77p(b), therefore, is subject to the normal remand rules of § 1447.

2. Given the court of appeals' linkage of the preemption "merits" discussion to its removal analysis, we briefly address here why the court also erred in viewing petitioners' claims as preempted by SLUSA. First, the court erred by focusing exclusively on whether petitioners' claims were "in connection with the purchase or sale" of securities. Second, even if petitioners' claims were "in connection with the purchase or sale" of securities after disposition of *Merrill Lynch v. Dabit*, No. 04-1371, their claims do not entail allegations of an "untrue statement or omission of a material fact." 15 U.S.C. § 77p(b)(1). Instead, their claims assert that respondents acted negligently and recklessly by failing to follow practices that would protect petitioners' assets from the dilution in value caused by market timing.[18]

a. The court of appeals erroneously concluded that SLUSA's preemption provision applies in this case because petitioners' holder claims asserted here do not raise allegations "in connection with the purchase or sale" of securities within the meaning of § 77p(b). Respondent in *Merrill Lynch v. Dabit*, No. 04-1371, is correct in arguing that SLUSA does not preempt claims brought by private plaintiffs who neither bought nor sold any security in connection with a defendant's misconduct. The operative language in SLUSA's preemption provision – "in connection with the purchase or sale" – replicates the identical phrase in § 10(b) and Rule 10b-5, both of which proscribe fraudulent conduct "in connection with the purchase or sale of any security." In *Blue Chip Stamps*, this Court held, based on an interpretation of that phrase, that a pri-

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[18] *See* JA 181-82, 183, 186, 187-88 (¶¶ 56, 60, 69, 73) (*Potter*), 205, 206-07 (¶¶ 56, 60) (*Kircher*), 230, 231-32 (¶¶ 60, 64) (*Parthasarathy*), 255-56, 257-58 (¶¶ 49, 54) (*Dudley I*), 273-74, 275-76 (¶¶ 49, 54) (*Dudley II*), 290-91, 292-93 (¶¶ 49, 54) (*Vogeler*), 307, 308-09 (¶¶ 49, 53) (*Jackson*), 324, 326-27 (¶¶ 56-57, 62) (*Spurgeon*).

vate party does not allege misconduct "in connection with the purchase or sale of any security" within the meaning of § 10(b) and Rule 10b-5 unless that misconduct was in connection with the plaintiff's own purchase or sale of a security. *See* 421 U.S. at 730-31, 749. "When . . . judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its . . . judicial interpretations as well." *Bragdon v. Abbott*, 524 U.S. 624, 645 (1998); *see Lorillard v. Pons*, 434 U.S. 575, 581 (1978). The phrase "in connection with the purchase or sale" in SLUSA's preemption provision therefore must have the same meaning as the identical language in § 10(b) and Rule 10b-5. Accordingly, SLUSA's preemption provision does not apply to claims brought by holders of securities, as opposed to purchasers or sellers. *See generally* Resp. Br. at 21-38, No. 04-1371.

Under that correct reading of § 77p(b), petitioners' claims are not preempted by SLUSA. Petitioners do not seek to recover for injuries they sustained in connection with their own purchase or sale of a security. Instead, they seek compensation for the dilution of the value of the mutual-fund shares that they held while others engaged in market timing.[49] Indeed, holders are the only individuals injured by market timing; those who purchase and sell their fund shares benefit in the distorted valuation from which market timers benefit at the expense of holders. The dilution in an investor-holder's investment constitutes an injury uniquely suffered only by holders. Holders should not be denied the opportunity to bring state-law negligence or breach of fiduciary duty claims under a misapprehension that they are § 10(b) fraud claims in disguise. They are not such claims. Holder claims based on market timing cannot be brought as § 10(b) claims under the rule of *Blue Chip Stamps* because

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[49] *See* JA 180-84 (¶¶ 49-61) (*Potter*), 204-07 (¶¶ 51-61) (*Kircher*), 228-33 (¶¶ 53-65) (*Parthasarathy*), 254-59 (¶¶ 44-55) (*Dudley I*), 273-76 (¶¶ 44-55) (*Dudley II*), 289-93 (¶¶ 44-55) (*Vogeler*), 306-10 (¶¶ 44-54) (*Jackson*), 322-25 (¶¶ 49-58) (*Spurgeon*)

they do not involve the holder's own purchase or sale of a security. Rather, such claims to recover for harm caused by purchasers and sellers at the expense of holders can be brought only under state law.[50]

b. Even if the Court were to decide in *Merrill Lynch v. Dabit*, No. 04-1371, that SLUSA preempts class actions brought under state law alleging fraud in connection with the purchase or sale of securities by someone other than the plaintiff, petitioners' claims still are not preempted by SLUSA. For SLUSA's preemption provision to apply, a plaintiff must "alleg[e] an untrue statement or omission of a material fact" or "that the defendant used or employed any manipulative or deceptive device or contrivance." 15 U.S.C. § 77p(c). By its terms, that provision does not encompass claims that do not depend on allegations of fraud or manipulation.[51]

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[50] Contrary to the Seventh Circuit's erroneous view (Pet App 6a), such claims cannot be brought as derivative claims. By definition, derivative claims assert harm to the corporation in ways that adversely affect *all* shareholders. *See* 19 Am. Jur. 2d *Corporations* § 1947, at 134 (2004) ("An action brought by a stockholder is derivative if the gravamen of the complaint is an injury to the corporation or *to the whole body of its stock or property*") (emphasis added); *Daily Income Fund, Inc. v. Fox*, 464 U.S. 523, 528 (1984) ("a derivative suit is one founded on a right of action existing in the corporation itself, and in which the corporation itself is the appropriate plaintiff") (internal quotation marks omitted). But market timing does not affect all shareholders the same way. Those who sell at the same time as market timers (through fortuity or design) cause a similar harm to remaining holders of shares and reap a similar benefit for themselves. That is why the market-timing claims asserted by petitioners select a discrete time period and allege claims only for those share holdings investors maintained during that period.

[51] SLUSA's preemption provision therefore does not encompass class actions under state law to recover for harm caused by negligence; breach of contract, *see Falkowski v. Imation Corp.*, 309 F.3d 1123, 1131 (2002), *amended on other grounds*, 320 F.3d 905 (9th Cir. 2003); *Norman v. Salomon Smith Barney, Inc.*, 350 F. Supp. 2d 382, 385-88 (S.D.N.Y. 2004); *Xpedior Creditor Trust v. Credit Suisse First Boston (USA) Inc.*, 341 F. Supp. 2d 258, 269-70 (S.D.N.Y. 2004); or breach of fiduciary duties or the implied covenants of good faith and fair dealing, *see Norman*, 350 F. Supp. 2d at 385-88; *Xpedior Creditor Trust*, 341 F.

That conclusion is consistent with this Court's decision in *Santa Fe Industries, Inc. v. Green*, 430 U.S. 462 (1977). In that case, the Court rejected a claim that a majority shareholder had violated § 10(b) and Rule 10b-5 – which together make it unlawful to use "fraud" or a "manipulative or deceptive device or contrivance" in connection with the purchase or sale of a security – by undervaluing shares in buying out minority shareholders during a short-form merger. *Id.* at 470. The Court explained that the complaint had not alleged a misrepresentation of fact, and it concluded that "the transaction, if carried out as alleged in the complaint, was neither deceptive nor manipulative and therefore did not violate either § 10(b) of the Act or Rule 10b-5." *Id.* at 474. Accordingly, the Court concluded, the shareholders' action was simply a state-law claim for breach of fiduciary duty. *Id.* at 479. Because SLUSA's preemption provision tracks the language of § 10(b) and Rule 10b-5, *Santa Fe*'s holding that negligence claims fall outside the ambit of federal securities laws means that such claims also fall outside the preemptive scope of § 77p(b).

Petitioners' complaints allege that respondents acted negligently or recklessly by failing to evaluate whether they were vulnerable to market timing because of changes in the value of shares in respondents' portfolio after the close of the native market but before the calculation of the NAV and by failing to adhere to their published policies designed to discourage or eliminate market timing.[32] Nowhere in the complaints do petitioners allege that they suffered harm because of fraudulent statements made by respondents. Instead, the gravamen of petitioners' complaints is that respondents inadequately protected the funds from market timing. To prevail on those claims,

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Supp. 2d at 269-70; *cf.* Pet. App. 6a (citing *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462 (1977)).

[32] *See* JA 180-84 (¶¶ 49-61) (*Potter*), 204-07 (¶¶ 51-61) (*Kircher*), 228-33 (¶¶ 53-65) (*Parthasarathy*), 254-59 (¶¶ 44-55) (*Dudley I*), 273-76 (¶¶ 44-55) (*Dudley II*), 289-93 (¶¶ 44-55) (*Vogeler*), 306-10 (¶¶ 44-54) (*Jackson*), 322-25 (¶¶ 49-58) (*Spurgeon*).

petitioners need not prove that respondents made a misrepresentation or omission, or engaged in manipulation. They must show only that respondents were aware, or should have been aware, of the risks posed by market timing, but did not take any action to prevent it.[53]

Despite the foregoing, the court of appeals concluded that petitioners' claims were preempted, stating that "[p]laintiffs do not contend that . . . their suits allege mismanagement rather than deceit or manipulation." Pet. App. 6a. That statement is belied by the face of the complaints themselves, all of which clearly allege only claims of negligence and recklessness for respondents' failure to adopt practices that would protect petitioners' assets from the dilution in value caused by market-timing negligence or breach of fiduciary duty.[54] Moreover, because SLUSA preemption raises a question of federal subject-matter jurisdiction, *see supra* pp. 31-34, the court erred in thinking that this argument was subject to waiver. It is not. As this Court has held numerous times, subject-matter jurisdiction "can never be forfeited or waived," because it "involves a [federal] court's power to hear a case." *United States v. Cotton*, 535 U.S. 625, 630 (2002); *see Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 95 (1998) ("Every federal appellate court has a special obligation to

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[53] To state a negligence claim, a plaintiff must allege "a duty the defendant owes to the plaintiff, a breach of that duty by the defendant, a causal connection between the breach and the plaintiff's injury, and actual injury." 57A Am. Jur. 2d *Negligence* § 71, at 141 (2004). To state a claim for recklessness, a plaintiff must allege that he was harmed by an act that the defendant "intentionally perform[ed]" and that was "so unreasonable and dangerous" that the defendant should have known it was "highly probable that harm [would] result." *Id.* § 276, at 340. An "untrue statement or omission of a material fact" or a "manipulative or deceptive device or contrivance" is neither an element of those state-law claims nor a fact asserted to support petitioners' claims.

[54] *See* JA 181-82, 183, 186, 187-88 (¶¶ 56, 60, 69, 73) (*Potter*), 205, 206-07 (¶¶ 56, 60) (*Kircher*), 230, 231-32 (¶¶ 60, 64) (*Parthasarathy*), 255-56, 257-58 (¶¶ 49, 54) (*Dudley I*), 273-74, 275-76 (¶¶ 49, 54) (*Dudley II*), 290-91, 292-93 (¶¶ 49, 54) (*Vogeler*), 307, 308-09 (¶¶ 49, 53) (*Jackson*), 324, 326-27 (¶¶ 56-57, 62) (*Spurgeon*).

satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review, even though the parties are prepared to concede it.") (internal quotation marks and brackets omitted).

Accordingly, because petitioners' claims fall outside the ambit of SLUSA preemption in § 77p(b), the district courts lacked subject-matter jurisdiction over the claims and remand to state court was therefore appropriate. And because the district courts in all of these consolidated cases correctly reached that judgment, the Seventh Circuit erred in thinking that it had appellate jurisdiction to review those remand orders.

III. PERMITTING REVIEW OF SLUSA REMAND ORDERS WOUD CONTRAVENE CONGRESS'S POLICY JUDGMENT IN § 1447(d)

The prohibition on the review of remand orders derives from Congress's long-held "policy of not permitting interruption of the litigation of the merits of a removed cause by prolonged litigation of questions of jurisdiction of the district court to which the cause is removed." *Rice*, 327 U.S. at 751; *see Thermtron*, 423 U.S. at 351 ("There is no doubt that in order to prevent delay in the trial of remanded cases by protracted litigation of jurisdictional issues, Congress immunized from all forms of appellate review any remand order issued on the grounds specified in § 1447(c)"). Such interruptions unfairly increase the delay that a plaintiff must endure when a claim that he has filed in state court has been removed to federal court.

As then-Justice Rehnquist explained in his dissent in *Thermtron*:

> Congress' purpose in barring review of all remand orders has always been very clear – to prevent the additional delay which a removing party may achieve by seeking appellate reconsideration of an order of remand. The removal jurisdiction extended by Congress works a significant interference in the conduct of litigation commenced in state court. While Congress felt that making

> available a federal forum in appropriate instances justifies some such interruption and delay, it obviously thought it equally important that when removal to a federal court is not warranted the case should be returned to the state court as expeditiously as possible. If this balanced concern is disregarded, federal removal provisions may become a device affording litigants a means of substantially delaying justice.

423 U.S. at 354-55 (Rehnquist, J., dissenting). Upholding the Seventh Circuit's erroneous decision will undermine that "strong congressional policy against review of remand orders," *Things Remembered*, 516 U.S. at 136 (Ginsburg & Stevens, JJ., concurring) (internal quotation marks omitted), by unfairly delaying the resolution of claims of litigants who properly brought their claims in state court.

Although giving lip-service to Congress's long-standing policy against burdening litigants with delay caused by appellate review of orders remanding cases for lack of subject-matter jurisdiction, the court of appeals concluded that review of remand orders under SLUSA would result in "little cost in delay beyond" the delay already caused by the removal and that this delay was warranted because SLUSA requires "that one specific substantive decision in securities litigation must be made by the federal rather than the state judiciary." Pet. App. 15a. That analysis is wrong on three counts.

First, the federal judiciary *did* resolve the preemption issue in this case. Each of the district courts in this case determined that petitioners' claims were not preempted by SLUSA. The fact that SLUSA authorizes federal district courts to determine whether a claim is preempted by SLUSA and therefore removable does not mean that that determination must be reviewable on appeal. It has long been recognized that Congress has the power to preclude review of any order in the court of appeals. *See Sheldon v. Sill*, 49 U.S. (8 How.) 441, 449 (1850) ("Courts created by statute can have no jurisdiction but such as the statute

confers."). Congress exercised that power when it enacted § 1447(d)'s prohibition on appellate review of orders remanding for lack of subject-matter jurisdiction.

Second, contrary to the court of appeals' apparent view, Congress did not vest the federal judiciary with exclusive power to interpret and apply SLUSA's preemption provision. While SLUSA *permits* removal of preempted claims, it does not *require* removal. "It is black letter law . . . that the mere grant of jurisdiction to a federal court does not operate to oust a state court from concurrent jurisdiction." *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 479 (1981); *see also Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 149-50 (1988) ("[W]hen a state proceeding presents a federal . . . pre-emption issue, the proper course is to seek resolution of that issue by the state court."). Congress's decision not to confer exclusive jurisdiction on federal courts over securities class actions reflects Congress's judgment that state courts are competent to resolve whether SLUSA preempts a particular claim.

Third, by concluding that permitting appeals of remand orders under SLUSA would result in excusable delays, the court of appeals impermissibly ignored the policy concerns advanced in the removal scheme crafted by Congress in SLUSA and § 1447. By authorizing removal of certain claims under SLUSA, Congress determined that the need for the availability of a federal forum to resolve whether a securities class action under state law must be dismissed as preempted justified imposing on plaintiffs the costs and delays associated with removal. But the absence from SLUSA of a provision authorizing appellate review of remand orders reflects Congress's decision not to saddle plaintiffs who already have suffered delay through removal with the additional delay and costs associated with appeal. Instead, "Congress decided to place final responsibility for implementation of its removal scheme with the district courts." *Thermtron*, 423 U.S. at 361 (Rehnquist, J., dissenting). By disregarding the limits on its jurisdiction prescribed by Congress in § 1447(d), the

court of appeals impermissibly substituted its own judgment for that of Congress.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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APPENDIX

TABLE OF CONTENTS

Page

Statutory and Regulatory Provisions Involved:

15 U.S.C. § 77p 1a

15 U.S.C. § 78bb 6a

Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, 112 Stat. 3227 (excerpt) 15a

§ 2 (Findings) 15a
§ 101(a)(1) (adding 15 U.S.C. § 77p) 16a
§ 101(b)(1)(B) (adding 15 U.S.C. § 78bb(f)) 21a

15 U.S.C. § 78j 26a

28 U.S.C. § 1441 ..... 28a

28 U.S.C. § 1447 ..... 31a

17 C.F.R. § 240.10b-5 ..... 32a

STATUTORY AND REGULATORY PROVISIONS INVOLVED

15 U.S.C. § 77p provides:

§ 77p. Additional remedies; limitation on remedies

(a) Remedies additional

Except as provided in subsection (b) of this section, the rights and remedies provided by this subchapter shall be in addition to any and all other rights and remedies that may exist at law or in equity.

(b) Class action limitations

No covered class action based upon the statutory or common law of any State or subdivision thereof may be maintained in any State or Federal court by any private party alleging –

(1) an untrue statement or omission of a material fact in connection with the purchase or sale of a covered security; or

(2) that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security.

(c) Removal of covered class actions

Any covered class action brought in any State court involving a covered security, as set forth in subsection (b) of this section, shall be removable to the Federal district court for the district in which the action is pending, and shall be subject to subsection (b) of this section.

(d) Preservation of certain actions

(1) Actions under State law of State of incorporation

(A) Actions preserved

Notwithstanding subsection (b) or (c) of this section, a covered class action described in subparagraph (B) of this paragraph that is based upon the statutory or common law of the State in which the issuer is incorporated (in the case of a corporation) or organized (in the case of any other entity) may be maintained in a State or Federal court by a private party.

(B) Permissible actions

A covered class action is described in this subparagraph if it involves –

(i) the purchase or sale of securities by the issuer or an affiliate of the issuer exclusively from or to holders of equity securities of the issuer; or

(ii) any recommendation, position, or other communication with respect to the sale of securities of the issuer that –

(I) is made by or on behalf of the issuer or an affiliate of the issuer to holders of equity securities of the issuer; and

(II) concerns decisions of those equity holders with respect to voting their securities, acting in response to a tender or exchange offer, or exercising dissenters' or appraisal rights.

(2) State actions

(A) In general

Notwithstanding any other provision of this section, nothing in this section may be construed to preclude a State or political subdivision thereof or a State pension plan from bringing an action involving

a covered security on its own behalf, or as a member of a class comprised solely of other States, political subdivisions, or State pension plans that are named plaintiffs, and that have authorized participation, in such action.

(B) "State pension plan" defined

For purposes of this paragraph, the term "State pension plan" means a pension plan established and maintained for its employees by the government of the State or political subdivision thereof, or by any agency or instrumentality thereof.

(3) Actions under contractual agreements between issuers and indenture trustees

Notwithstanding subsection (b) or (c) of this section, a covered class action that seeks to enforce a contractual agreement between an issuer and an indenture trustee may be maintained in a State or Federal court by a party to the agreement or a successor to such party.

(4) Remand of removed actions

In an action that has been removed from a State court pursuant to subsection (c) of this section, if the Federal court determines that the action may be maintained in State court pursuant to this subsection, the Federal court shall remand such action to such State court.

(e) Preservation of State jurisdiction

The securities commission (or any agency or office performing like functions) of any State shall retain jurisdiction under the laws of such State to investigate and bring enforcement actions.

(f) Definitions

For purposes of this section, the following definitions shall apply:

(1) Affiliate of the issuer

The term "affiliate of the issuer" means a person that directly or indirectly, through one or more intermediaries, controls or is controlled by or is under common control with, the issuer.

(2) Covered class action

(A) In general

The term "covered class action" means –

(i) any single lawsuit in which –

(I) damages are sought on behalf of more than 50 persons or prospective class members, and questions of law or fact common to those persons or members of the prospective class, without reference to issues of individualized reliance on an alleged misstatement or omission, predominate over any questions affecting only individual persons or members; or

(II) one or more named parties seek to recover damages on a representative basis on behalf of themselves and other unnamed parties similarly situated, and questions of law or fact common to those persons or members of the prospective class predominate over any questions affecting only individual persons or members; or

(ii) any group of lawsuits filed in or pending in the same court and involving common questions of law or fact, in which –

(I) damages are sought on behalf of more than 50 persons; and

(II) the lawsuits are joined, consolidated, or otherwise proceed as a single action for any purpose.

(B) Exception for derivative actions

Notwithstanding subparagraph (A), the term "covered class action" does not include an exclusively derivative action brought by one or more shareholders on behalf of a corporation.

(C) Counting of certain class members

For purposes of this paragraph, a corporation, investment company, pension plan, partnership, or other entity, shall be treated as one person or prospective class member, but only if the entity is not established for the purpose of participating in the action.

(D) Rule of construction

Nothing in this paragraph shall be construed to affect the discretion of a State court in determining whether actions filed in such court should be joined, consolidated, or otherwise allowed to proceed as a single action.

(3) Covered security

The term "covered security" means a security that satisfies the standards for a covered security specified in paragraph (1) or (2) of section 77r(b) of this title at the time during which it is alleged that the misrepresentation, omission, or manipulative or deceptive conduct occurred, except that such term shall not include any debt security that is exempt from registration under this subchapter pursuant to rules issued by the Commission under section 77d(2) of this title.

15 U.S.C. § 78bb provides:

§ 78bb. Effect on existing law

(a) Addition of rights and remedies; recovery of actual damages; State securities commissions

Except as provided in subsection (f) of this section, the rights and remedies provided by this chapter shall be in addition to any and all other rights and remedies that may exist at law or in equity; but no person permitted to maintain a suit for damages under the provisions of this chapter shall recover, through satisfaction of judgment in one or more actions, a total amount in excess of his actual damages on account of the act complained of. Except as otherwise specifically provided in this chapter, nothing in this chapter shall affect the jurisdiction of the securities commission (or any agency or officer performing like functions) of any State over any security or any person insofar as it does not conflict with the provisions of this chapter or the rules and regulations thereunder. No State law which prohibits or regulates the making or promoting of wagering or gaming contracts, or the operation of "bucket shops" or other similar or related activities, shall invalidate any put, call, straddle, option, privilege, or other security subject to this chapter, or apply to any activity which is incidental or related to the offer, purchase, sale, exercise, settlement, or closeout of any such security. No provision of State law regarding the offer, sale, or distribution of securities shall apply to any transaction in a security futures product, except that this sentence shall not be construed as limiting any State antifraud law of general applicability.

(b) Modification of disciplinary procedures

Nothing in this chapter shall be construed to modify existing law with regard to the binding effect (1) on any member of or participant in any self-regulatory organization of any action taken by the authorities of such organization to settle disputes between its members or partici-

pants, (2) on any municipal securities dealer or municipal securities broker of any action taken pursuant to a procedure established by the Municipal Securities Rulemaking Board to settle disputes between municipal securities dealers and municipal securities brokers, or (3) of any action described in paragraph (1) or (2) on any person who has agreed to be bound thereby.

(c) Continuing validity of disciplinary sanctions

The stay, setting aside, or modification pursuant to section 78s(e) of this title of any disciplinary sanction imposed by a self-regulatory organization on a member thereof, person associated with a member, or participant therein, shall not affect the validity or force of any action taken as a result of such sanction by the self-regulatory organization prior to such stay, setting aside, or modification: *Provided*, That such action is not inconsistent with the provisions of this chapter or the rules or regulations thereunder. The rights of any person acting in good faith which arise out of any such action shall not be affected in any way by such stay, setting aside, or modification.

(d) Physical location of facilities of registered clearing agencies or registered transfer agents not to subject changes in beneficial or record ownership of securities to State or local taxes

No State or political subdivision thereof shall impose any tax on any change in beneficial or record ownership of securities effected through the facilities of a registered clearing agency or registered transfer agent or any nominee thereof or custodian therefor or upon the delivery or transfer of securities to or through or receipt from such agency or agent or any nominee thereof or custodian therefor, unless such change in beneficial or record ownership or such transfer or delivery or receipt would otherwise be taxable by such State or political subdivision if the facilities of such registered clearing agency, registered transfer agent, or any nominee thereof or custodian therefor were not physically located in the taxing State or

political subdivision. No State or political subdivision thereof shall impose any tax on securities which are deposited in or retained by a registered clearing agency, registered transfer agent, or any nominee thereof or custodian therefor, unless such securities would otherwise be taxable by such State or political subdivision if the facilities of such registered clearing agency, registered transfer agent, or any nominee thereof or custodian therefor were not physically located in the taxing State or political subdivision.

(e) Exchange, broker, and dealer commissions; brokerage and research services

(1) No person using the mails, or any means or instrumentality of interstate commerce, in the exercise of investment discretion with respect to an account shall be deemed to have acted unlawfully or to have breached a fiduciary duty under State or Federal law unless expressly provided to the contrary by a law enacted by the Congress or any State subsequent to June 4, 1975, solely by reason of his having caused the account to pay a member of an exchange, broker, or dealer an amount of commission for effecting a securities transaction in excess of the amount of commission another member of an exchange, broker, or dealer would have charged for effecting that transaction, if such person determined in good faith that such amount of commission was reasonable in relation to the value of the brokerage and research services provided by such member, broker, or dealer, viewed in terms of either that particular transaction or his overall responsibilities with respect to the accounts as to which he exercises investment discretion. This subsection is exclusive and plenary insofar as conduct is covered by the foregoing, unless otherwise expressly provided by contract: *Provided*, however, That nothing in this subsection shall be construed to impair or limit the power of the Commission under any other provision of this chapter or otherwise.

(2) A person exercising investment discretion with respect to an account shall make such disclosure of his policies and practices with respect to commissions that will be paid for effecting securities transactions, at such times and in such manner, as the appropriate regulatory agency, by rule, may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(3) For purposes of this subsection a person provides brokerage and research services insofar as he –

(A) furnishes advice, either directly or through publications or writings, as to the value of securities, the advisability of investing in, purchasing, or selling securities, and the availability of securities or purchasers or sellers of securities;

(B) furnishes analyses and reports concerning issuers, industries, securities, economic factors and trends, portfolio strategy, and the performance of accounts; or

(C) effects securities transactions and performs functions incidental thereto (such as clearance, settlement, and custody) or required in connection therewith by rules of the Commission or a self-regulatory organization of which such person is a member or person associated with a member or in which such person is a participant.

(4) The provisions of this subsection shall not apply with regard to securities that are security futures products.

(f) Limitations on remedies

(1) Class action limitations

No covered class action based upon the statutory or common law of any State or subdivision thereof may be maintained in any State or Federal court by any private party alleging –

(A) a misrepresentation or omission of a material fact in connection with the purchase or sale of a covered security; or

(B) that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security.

(2) Removal of covered class actions

Any covered class action brought in any State court involving a covered security, as set forth in paragraph (1), shall be removable to the Federal district court for the district in which the action is pending, and shall be subject to paragraph (1).

(3) Preservation of certain actions

(A) Actions under State law of State of incorporation

(i) Actions preserved

Notwithstanding paragraph (1) or (2), a covered class action described in clause (ii) of this subparagraph that is based upon the statutory or common law of the State in which the issuer is incorporated (in the case of a corporation) or organized (in the case of any other entity) may be maintained in a State or Federal court by a private party.

(ii) Permissible actions

A covered class action is described in this clause if it involves –

(I) the purchase or sale of securities by the issuer or an affiliate of the issuer exclusively from or to holders of equity securities of the issuer; or

(II) any recommendation, position, or other communication with respect to the sale of securities of an issuer that –

(aa) is made by or on behalf of the issuer or an affiliate of the issuer to holders of equity securities of the issuer; and

(bb) concerns decisions of such equity holders with respect to voting their securities, acting in response to a tender or exchange offer, or exercising dissenters' or appraisal rights.

(B) State actions

(i) In general

Notwithstanding any other provision of this subsection, nothing in this subsection may be construed to preclude a State or political subdivision thereof or a State pension plan from bringing an action involving a covered security on its own behalf, or as a member of a class comprised solely of other States, political subdivisions, or State pension plans that are named plaintiffs, and that have authorized participation, in such action.

(ii) State pension plan defined

For purposes of this subparagraph, the term "State pension plan" means a pension plan established and maintained for its employees by the government of a State or political subdivision thereof, or by any agency or instrumentality thereof.

(C) Actions under contractual agreements between issuers and indenture trustees

Notwithstanding paragraph (1) or (2), a covered class action that seeks to enforce a contractual agreement between an issuer and an indenture trustee may be maintained in a State or Federal court by a party to the agreement or a successor to such party.

(D) Remand of removed actions

In an action that has been removed from a State court pursuant to paragraph (2), if the Federal court determines that the action may be maintained in State court pursuant to this subsection, the Federal court shall remand such action to such State court.

(4) Preservation of State jurisdiction

The securities commission (or any agency or office performing like functions) of any State shall retain jurisdiction under the laws of such State to investigate and bring enforcement actions.

(5) Definitions

For purposes of this subsection, the following definitions shall apply:

(A) Affiliate of the issuer

The term "affiliate of the issuer" means a person that directly or indirectly, through one or more intermediaries, controls or is controlled by or is under common control with, the issuer.

(B) Covered class action

The term "covered class action" means –

(i) any single lawsuit in which –

(I) damages are sought on behalf of more than 50 persons or prospective class members, and questions of law or fact common to those persons or members of the prospective class, without reference to issues of individualized reliance on an alleged misstatement or omission, predominate over any questions affecting only individual persons or members; or

(II) one or more named parties seek to recover damages on a representative basis on behalf of themselves and other unnamed parties

similarly situated, and questions of law or fact common to those persons or members of the prospective class predominate over any questions affecting only individual persons or members; or

(ii) any group of lawsuits filed in or pending in the same court and involving common questions of law or fact, in which –

(I) damages are sought on behalf of more than 50 persons; and

(II) the lawsuits are joined, consolidated, or otherwise proceed as a single action for any purpose.

(C) Exception for derivative actions

Notwithstanding subparagraph (B), the term "covered class action" does not include an exclusively derivative action brought by one or more shareholders on behalf of a corporation.

(D) Counting of certain class members

For purposes of this paragraph, a corporation, investment company, pension plan, partnership, or other entity, shall be treated as one person or prospective class member, but only if the entity is not established for the purpose of participating in the action.

(E) Covered security

The term "covered security" means a security that satisfies the standards for a covered security specified in paragraph (1) or (2) of section 18(b) of the Securities Act of 1933 [15 U.S.C. 77r(b)], at the time during which it is alleged that the misrepresentation, omission, or manipulative or deceptive conduct occurred, except that such term shall not include any debt security that is exempt from registration under the Securities Act of 1933 [15 U.S.C. 77a et seq.] pursuant to

rules issued by the Commission under section 4(2) of that Act [15 U.S.C. 77d(2)].

(F) Rule of construction

Nothing in this paragraph shall be construed to affect the discretion of a State court in determining whether actions filed in such court should be joined, consolidated, or otherwise allowed to proceed as a single action.

The Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, 112 Stat. 3227, provides in relevant part:

To amend the Securities Act of 1933 and the Securities Exchange Act of 1934 to limit the conduct of securities class actions under State law, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Securities Litigation Uniform Standards Act of 1998".

SEC. 2. FINDINGS.

The Congress finds that –

(1) the Private Securities Litigation Reform Act of 1995 sought to prevent abuses in private securities fraud lawsuits;

(2) since enactment of that legislation, considerable evidence has been presented to Congress that a number of securities class action lawsuits have shifted from Federal to State courts;

(3) this shift has prevented that Act from fully achieving its objectives;

(4) State securities regulation is of continuing importance, together with Federal regulation of securities, to protect investors and promote strong financial markets; and

(5) in order to prevent certain State private securities class action lawsuits alleging fraud from being used to frustrate the objectives of the Private Securities Litigation Reform Act of 1995, it is appropriate to enact national standards for securities class action lawsuits involving nationally traded securities, while preserving the appropri-

ate enforcement powers of State securities regulators and not changing the current treatment of individual lawsuits.

TITLE I – SECURITIES LITIGATION UNIFORM STANDARDS

SEC. 101. LIMITATION ON REMEDIES.

(a) AMENDMENTS TO THE SECURITIES ACT OF 1933. –

(1) AMENDMENT. – Section 16 of the Securities Act of 1933 (15 U.S.C. 77p) is amended to read as follows:

"SEC. 16. ADDITIONAL REMEDIES; LIMITATION ON REMEDIES.

"(a) REMEDIES ADDITIONAL. – Except as provided in subsection (b), the rights and remedies provided by this title shall be in addition to any and all other rights and remedies that may exist at law or in equity.

"(b) CLASS ACTION LIMITATIONS. – No covered class action based upon the statutory or common law of any State or subdivision thereof may be maintained in any State or Federal court by any private party alleging –

"(1) an untrue statement or omission of a material fact in connection with the purchase or sale of a covered security; or

"(2) that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security.

"(c) REMOVAL OF COVERED CLASS ACTIONS. – Any covered class action brought in any State court involving a covered security, as set forth in subsection (b), shall be removable to the Federal district court for the district in which the action is pending, and shall be subject to subsection (b).

"(d) PRESERVATION OF CERTAIN ACTIONS. –

"(1) ACTIONS UNDER STATE LAW OF STATE OF INCORPORATION. –

"(A) ACTIONS PRESERVED. – Notwithstanding subsection (b) or (c), a covered class action described in subparagraph (B) of this paragraph that is based upon the statutory or common law of the State in which the issuer is incorporated (in the case of a corporation) or organized (in the case of any other entity) may be maintained in a State or Federal court by a private party.

"(B) PERMISSIBLE ACTIONS. – A covered class action is described in this subparagraph if it involves –

"(i) the purchase or sale of securities by the issuer or an affiliate of the issuer exclusively from or to holders of equity securities of the issuer; or

"(ii) any recommendation, position, or other communication with respect to the sale of securities of the issuer that –

"(I) is made by or on behalf of the issuer or an affiliate of the issuer to holders of equity securities of the issuer; and

"(II) concerns decisions of those equity holders with respect to voting their securities, acting in response to a tender or exchange offer, or exercising dissenters' or appraisal rights.

"(2) STATE ACTIONS. –

"(A) IN GENERAL. – Notwithstanding any other provision of this section, nothing in this section may be construed to preclude a State or political subdivision thereof or a State pension plan from bringing an action involving a covered security on its own behalf, or as a member of a class comprised solely of other States, political subdivisions, or State pension plans

that are named plaintiffs, and that have authorized participation, in such action.

"(B) STATE PENSION PLAN DEFINED. – For purposes of this paragraph, the term 'State pension plan' means a pension plan established and maintained for its employees by the government of the State or political subdivision thereof, or by any agency or instrumentality thereof.

"(3) ACTIONS UNDER CONTRACTUAL AGREEMENTS BETWEEN ISSUERS AND INDENTURE TRUSTEES. – Notwithstanding subsection (b) or (c), a covered class action that seeks to enforce a contractual agreement between an issuer and an indenture trustee may be maintained in a State or Federal court by a party to the agreement or a successor to such party.

"(4) REMAND OF REMOVED ACTIONS. – In an action that has been removed from a State court pursuant to subsection (c), if the Federal court determines that the action may be maintained in State court pursuant to this subsection, the Federal court shall remand such action to such State court.

"(e) PRESERVATION OF STATE JURISDICTION. – The securities commission (or any agency or office performing like functions) of any State shall retain jurisdiction under the laws of such State to investigate and bring enforcement actions.

"(f) DEFINITIONS. – For purposes of this section, the following definitions shall apply:

"(1) AFFILIATE OF THE ISSUER. – The term 'affiliate of the issuer' means a person that directly or indirectly, through one or more intermediaries, controls or is controlled by or is under common control with, the issuer.

"(2) COVERED CLASS ACTION. –

"(A) IN GENERAL. – The term 'covered class action' means –

"(i) any single lawsuit in which –

"(I) damages are sought on behalf of more than 50 persons or prospective class members, and questions of law or fact common to those persons or members of the prospective class, without reference to issues of individualized reliance on an alleged misstatement or omission, predominate over any questions affecting only individual persons or members; or

"(II) one or more named parties seek to recover damages on a representative basis on behalf of themselves and other unnamed parties similarly situated, and questions of law or fact common to those persons or members of the prospective class predominate over any questions affecting only individual persons or members; or

"(ii) any group of lawsuits filed in or pending in the same court and involving common questions of law or fact, in which –

"(I) damages are sought on behalf of more than 50 persons; and

"(II) the lawsuits are joined, consolidated, or otherwise proceed as a single action for any purpose.

"(B) EXCEPTION FOR DERIVATIVE ACTIONS. – Notwithstanding subparagraph (A), the term 'covered class action' does not include an exclusively derivative action brought by one or more shareholders on behalf of a corporation.

"(C) COUNTING OF CERTAIN CLASS MEMBERS. – For purposes of this paragraph, a corporation, investment company, pension plan, partnership, or other entity, shall be treated as one person or prospective class member, but only if the entity is not established for the purpose of participating in the action.

"(D) RULE OF CONSTRUCTION. – Nothing in this paragraph shall be construed to affect the discretion of a State court in determining whether actions filed in such court should be joined, consolidated, or otherwise allowed to proceed as a single action.

"(3) COVERED SECURITY. – The term 'covered security' means a security that satisfies the standards for a covered security specified in paragraph (1) or (2) of section 18(b) [15 U.S.C. § 77r(b)] at the time during which it is alleged that the misrepresentation, omission, or manipulative or deceptive conduct occurred, except that such term shall not include any debt security that is exempt from registration under this title pursuant to rules issued by the Commission under section 4(2) [15 U.S.C. § 77d(2)].".

(2) CIRCUMVENTION OF STAY OF DISCOVERY. – Section 27(b) of the Securities Act of 1933 (15 U.S.C. 77z-1(b)) is amended by inserting after paragraph (3) the following new paragraph:

"(4) CIRCUMVENTION OF STAY OF DISCOVERY. – Upon a proper showing, a court may stay discovery proceedings in any private action in a State court as necessary in aid of its jurisdiction, or to protect or effectuate its judgments, in an action subject to a stay of discovery pursuant to this subsection.".

(3) CONFORMING AMENDMENTS. – Section 22(a) of the Securities Act of 1933 (15 U.S.C. 77v(a)) is amended –

(A) by inserting "except as provided in section 16 with respect to covered class actions," after "Territorial courts,"; and

(B) by striking "No case" and inserting "Except as provided in section 16(c), no case".

(b) AMENDMENTS TO THE SECURITIES EXCHANGE ACT OF 1934. –

(1) AMENDMENT. – Section 28 of the Securities Exchange Act of 1934 (15 U.S.C. 78bb) is amended –

(A) in subsection (a), by striking "The rights and remedies" and inserting "Except as provided in subsection (f), the rights and remedies"; and

(B) by adding at the end the following new subsection:

"(f) LIMITATIONS ON REMEDIES. –

"(1) CLASS ACTION LIMITATIONS. – No covered class action based upon the statutory or common law of any State or subdivision thereof may be maintained in any State or Federal court by any private party alleging –

"(A) a misrepresentation or omission of a material fact in connection with the purchase or sale of a covered security; or

"(B) that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security.

"(2) REMOVAL OF COVERED CLASS ACTIONS. – Any covered class action brought in any State court involving a covered security, as set forth in paragraph (1), shall be removable to the Federal district court for the district in which the action is pending, and shall be subject to paragraph (1).

"(3) PRESERVATION OF CERTAIN ACTIONS. –

"(A) ACTIONS UNDER STATE LAW OF STATE OF INCORPORATION. –

"(i) ACTIONS PRESERVED. – Notwithstanding paragraph (1) or (2), a covered class action described in clause (ii) of this subparagraph that is based upon the statutory or common law of the

State in which the issuer is incorporated (in the case of a corporation) or organized (in the case of any other entity) may be maintained in a State or Federal court by a private party.

"(ii) PERMISSIBLE ACTIONS. – A covered class action is described in this clause if it involves –

"(I) the purchase or sale of securities by the issuer or an affiliate of the issuer exclusively from or to holders of equity securities of the issuer; or

"(II) any recommendation, position, or other communication with respect to the sale of securities of an issuer that –

"(aa) is made by or on behalf of the issuer or an affiliate of the issuer to holders of equity securities of the issuer; and

"(bb) concerns decisions of such equity holders with respect to voting their securities, acting in response to a tender or exchange offer, or exercising dissenters' or appraisal rights.

"(B) STATE ACTIONS. –

"(i) IN GENERAL. – Notwithstanding any other provision of this subsection, nothing in this subsection may be construed to preclude a State or political subdivision thereof or a State pension plan from bringing an action involving a covered security on its own behalf, or as a member of a class comprised solely of other States, political subdivisions, or State pension plans that are named plaintiffs, and that have authorized participation, in such action.

"(ii) STATE PENSION PLAN DEFINED. – For purposes of this subparagraph, the term 'State pension plan' means a pension plan established and maintained for its employees by the government of

a State or political subdivision thereof, or by any agency or instrumentality thereof.

"(C) ACTIONS UNDER CONTRACTUAL AGREEMENTS BETWEEN ISSUERS AND INDENTURE TRUSTEES. – Notwithstanding paragraph (1) or (2), a covered class action that seeks to enforce a contractual agreement between an issuer and an indenture trustee may be maintained in a State or Federal court by a party to the agreement or a successor to such party.

"(D) REMAND OF REMOVED ACTIONS. – In an action that has been removed from a State court pursuant to paragraph (2), if the Federal court determines that the action may be maintained in State court pursuant to this subsection, the Federal court shall remand such action to such State court.

"(4) PRESERVATION OF STATE JURISDICTION. – The securities commission (or any agency or office performing like functions) of any State shall retain jurisdiction under the laws of such State to investigate and bring enforcement actions.

"(5) DEFINITIONS. – For purposes of this subsection, the following definitions shall apply:

"(A) AFFILIATE OF THE ISSUER. – The term 'affiliate of the issuer' means a person that directly or indirectly, through one or more intermediaries, controls or is controlled by or is under common control with, the issuer.

"(B) COVERED CLASS ACTION. – The term 'covered class action' means –

"(i) any single lawsuit in which –

"(I) damages are sought on behalf of more than 50 persons or prospective class members, and questions of law or fact common to those persons or members of the prospective class, without reference to issues of individualized reliance on an

alleged misstatement or omission, predominate over any questions affecting only individual persons or members; or

"(II) one or more named parties seek to recover damages on a representative basis on behalf of themselves and other unnamed parties similarly situated, and questions of law or fact common to those persons or members of the prospective class predominate over any questions affecting only individual persons or members; or

"(ii) any group of lawsuits filed in or pending in the same court and involving common questions of law or fact, in which –

"(I) damages are sought on behalf of more than 50 persons; and

"(II) the lawsuits are joined, consolidated, or otherwise proceed as a single action for any purpose.

"(C) EXCEPTION FOR DERIVATIVE ACTIONS. – Notwithstanding subparagraph (B), the term 'covered class action' does not include an exclusively derivative action brought by one or more shareholders on behalf of a corporation.

"(D) COUNTING OF CERTAIN CLASS MEMBERS. – For purposes of this paragraph, a corporation, investment company, pension plan, partnership, or other entity, shall be treated as one person or prospective class member, but only if the entity is not established for the purpose of participating in the action.

"(E) COVERED SECURITY. – The term 'covered security' means a security that satisfies the standards for a covered security specified in paragraph (1) or (2) of section 18(b) of the Securities Act of 1933 [15 U.S.C. § 77r(b)], at the time during which it is alleged that the misrepresentation, omission, or manipulative or de-

ceptive conduct occurred, except that such term shall not include any debt security that is exempt from registration under the Securities Act of 1933 pursuant to rules issued by the Commission under section 4(2) of that Act [15 U.S.C. § 77d(2)].

"(F) RULE OF CONSTRUCTION. – Nothing in this paragraph shall be construed to affect the discretion of a State court in determining whether actions filed in such court should be joined, consolidated, or otherwise allowed to proceed as a single action.".

(2) CIRCUMVENTION OF STAY OF DISCOVERY. – Section 21D(b)(3) of the Securities Exchange Act of 1934 (15 U.S.C. 78u-4(b)(3)) is amended by adding at the end the following new subparagraph:

"(D) CIRCUMVENTION OF STAY OF DISCOVERY. – Upon a proper showing, a court may stay discovery proceedings in any private action in a State court, as necessary in aid of its jurisdiction, or to protect or effectuate its judgments, in an action subject to a stay of discovery pursuant to this paragraph.".

(c) APPLICABILITY. – The amendments made by this section shall not affect or apply to any action commenced before and pending on the date of enactment of this Act.

* * * * *

15 U.S.C. § 78j provides:

§ 78j. Manipulative and deceptive devices

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange –

(a)(1) To effect a short sale, or to use or employ any stop-loss order in connection with the purchase or sale, of any security registered on a national securities exchange, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(2) Paragraph (1) of this subsection shall not apply to security futures products.

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, or any securities-based swap agreement (as defined in section 206B of the Gramm-Leach-Bliley Act), any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Rules promulgated under subsection (b) of this section that prohibit fraud, manipulation, or insider trading (but not rules imposing or specifying reporting or recordkeeping requirements, procedures, or standards as prophylactic measures against fraud, manipulation, or insider trading), and judicial precedents decided under subsection (b) of this section and rules promulgated thereunder that prohibit fraud, manipulation, or insider trading, shall apply to security-based swap agreements (as defined in section 206B of the Gramm-Leach-Bliley Act) to the same extent as they apply to securities. Judicial precedents decided under section 77q(a) of this title and sections 78i,

78o, 78p, 78t, and 78u-1 of this title, and judicial precedents decided under applicable rules promulgated under such sections, shall apply to security-based swap agreements (as defined in section 206B of the Gramm-Leach-Bliley Act) to the same extent as they apply to securities.

28 U.S.C. § 1441 provides:

§ 1441. Actions removable generally

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Whenever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title is joined with one or more otherwise nonremovable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters in which State law predominates.

(d) Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending. Upon removal the action shall be tried by the court without jury. Where removal is based upon this subsection, the time limitations of section 1446(b) of this chapter may be enlarged at any time for cause shown.

(e)(1) Notwithstanding the provisions of subsection (b) of this section, a defendant in a civil action in a State court may remove the action to the district court of the United States for the district and division embracing the place where the action is pending if –

(A) the action could have been brought in a United States district court under section 1369 of this title; or

(B) the defendant is a party to an action which is or could have been brought, in whole or in part, under section 1369 in a United States district court and arises from the same accident as the action in State court, even if the action to be removed could not have been brought in a district court as an original matter.

The removal of an action under this subsection shall be made in accordance with section 1446 of this title, except that a notice of removal may also be filed before trial of the action in State court within 30 days after the date on which the defendant first becomes a party to an action under section 1369 in a United States district court that arises from the same accident as the action in State court, or at a later time with leave of the district court.

(2) Whenever an action is removed under this subsection and the district court to which it is removed or transferred under section 1407(j) has made a liability determination requiring further proceedings as to damages, the district court shall remand the action to the State court from which it had been removed for the determination of damages, unless the court finds that, for the convenience of parties and witnesses and in the interest of justice, the action should be retained for the determination of damages.

(3) Any remand under paragraph (2) shall not be effective until 60 days after the district court has issued an order determining liability and has certified its intention to remand the removed action for the determination of damages. An appeal with respect to the liability determi-

nation of the district court may be taken during that 60-day period to the court of appeals with appellate jurisdiction over the district court. In the event a party files such an appeal, the remand shall not be effective until the appeal has been finally disposed of. Once the remand has become effective, the liability determination shall not be subject to further review by appeal or otherwise.

(4) Any decision under this subsection concerning remand for the determination of damages shall not be reviewable by appeal or otherwise.

(5) An action removed under this subsection shall be deemed to be an action under section 1369 and an action in which jurisdiction is based on section 1369 of this title for purposes of this section and sections 1407, 1697, and 1785 of this title.

(6) Nothing in this subsection shall restrict the authority of the district court to transfer or dismiss an action on the ground of inconvenient forum.

(f) The court to which a civil action is removed under this section is not precluded from hearing and determining any claim in such civil action because the State court from which such civil action is removed did not have jurisdiction over that claim.

28 U.S.C. § 1447 provides:

§ 1447. Procedure after removal generally

(a) In any case removed from a State court, the district court may issue all necessary orders and process to bring before it all proper parties whether served by process issued by the State court or otherwise.

(b) It may require the removing party to file with its clerk copies of all records and proceedings in such State court or may cause the same to be brought before it by writ of certiorari issued to such State court.

(c) A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

(e) If after removal the plaintiff seeks to join additional defendants whose joinder would destroy subject matter jurisdiction, the court may deny joinder, or permit joinder and remand the action to the State court.

17 C.F.R. § 240.10b-5 provides:

§ 240.10b-5. Employment of manipulative and deceptive devices

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

in connection with the purchase or sale of any security.

Supreme Court U.S.
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No. 05-409

IN THE

Supreme Court of the United States

CARL KIRCHER, ET AL.,

Petitioners,

v.

PUTNAM FUNDS TRUST, ET AL.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

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QUESTION PRESENTED

The first question presented in the petition for a writ of certiorari is:

"Whether the court of appeals had jurisdiction, contrary to the holdings of three other circuits, to review a district court order remanding for lack of subject-matter jurisdiction a suit removed under the Securities Litigation Uniform Standards Act of 1998 ('SLUSA'), notwithstanding 28 U.S.C. § 1447(d)'s bar on appellate review of remand orders based on lack of subject-matter jurisdiction and the district courts' conclusion that petitioners' claims are not preempted by and thus not removable under SLUSA."

RULE 29.6 STATEMENT

Respondent Artisan Partners Limited Partnership has no parent corporation, and no publicly held company owns 10% or more of its stock. This respondent is a limited partnership, the general partner of which is Artisan Investment Corporation, which has no parent corporation, and no publicly held company owns 10% or more of its stock.

Respondent Artisan Funds, Inc. has no parent corporation, and no publicly held company owns 10% or more of its stock.

Respondent Columbia Wanger Asset Management, LP has no parent corporation, and no publicly held company owns 10% or more of its stock. This respondent is a limited partnership, the general partner of which is CWAM Acquisition GP, Inc., which is a wholly owned subsidiary of Columbia Management Group, Inc., which in turn is a wholly owned subsidiary of Fleet National Bank, which in turn is a subsidiary of Bank of America Corporation, a publicly traded company.

Respondent Columbia Acorn Trust has no parent corporation, and no publicly held company owns 10% or more of its stock.

Respondent Deutsche Investment Management Americas Inc. is a wholly owned subsidiary of Deutsche Bank Americas Holding Corp., which is a wholly owned subsidiary of Taunus Corporation, which is a wholly owned subsidiary of Deutsche Bank AG, a publicly traded company that owns 10% or more of respondent's stock. No other publicly held company owns 10% or more of its stock.

Respondent Janus Capital Management LLC is a wholly owned subsidiary of Janus Capital Group Inc., a publicly traded company that owns 10% or more of respondent's stock. No other publicly held company owns 10% or more of its stock.

Respondent Janus Investment Fund has no parent corporation, and no publicly held company owns 10% or more of its stock.

Respondent Pacific Life Insurance Company is a wholly owned subsidiary of Pacific Life Corporation, a private stock holding company. No publicly held company owns 10% or more of respondent's stock.

Respondent Putnam Investment Management, LLC is an indirect subsidiary of Marsh & McLennan Companies, Inc., a publicly traded company that owns 10% or more of respondent's stock.. No other publicly held company owns 10% or more of its stock.

Respondents Putnam Funds Trust, Putnam International Equity Fund, and Putnam Investment Funds have no parent corporation and no publicly held company owns 10% or more of their stock.

Respondent Scudder International Fund, Inc. has no parent corporation, and no publicly held company owns 10% or more of its stock.

Respondent Van Kampen Investment Advisory Corporation merged on November 30, 2003, into Van Kampen Asset Management, which is a wholly owned subsidiary of Van Kampen Investments, Inc., which is a wholly owned subsidiary of MSAM Holding II Inc., which is a wholly owned subsidiary of Morgan Stanley, a publicly traded company that owns 10% or more of respondent's stock. No other publicly held company owns 10% or more of its stock.

Respondent Van Kampen Series Fund, Inc. has no parent corporation, and no publicly held company owns 10% or more of its stock.

TABLE OF CONTENTS

STATEMENT 1

SUMMARY OF ARGUMENT 6

ARGUMENT 10

I. The Seventh Circuit Properly Exercised Appellate Jurisdiction Under *Thermtron* 10

A. The Remand Orders Were Not Based On A Lack Of Subject-Matter Jurisdiction 11

1. The Jurisdictional Label Used By The District Court Is Not Conclusive 12

2. The Seventh Circuit Correctly Rejected The District Court's Jurisdictional Label 16

a. SLUSA's Removal Provision Is Broader Than Its Preclusion Provision 18

b. A Colorable Defense Of SLUSA Preclusion Is Sufficient To Confer Removal Jurisdiction 25

c. Respondents Asserted A Colorable Defense Of SLUSA Preclusion 28

d. Because It Had Removal Jurisdiction, The District Court's Remand Orders Were Discretionary 32

B. Affirmance Would Further The Objectives Of SLUSA Without Undermining The Policy Of § 1447(d) 37

II. The Seventh Circuit Also Had Appellate Jurisdiction Under *Waco* 41

CONCLUSION 47

TABLE OF AUTHORITIES

Cases

Abney v. *United States*,
431 U.S. 651 (1977) 41

Adkins v. *Ill. Cent. R.R. Co.*,
326 F.3d 828 (7th Cir. 2003) 43

Alaska Dep't of Envtl. Conservation v. *EPA*,
540 U.S. 461 (2004) 23

Aliota v. *Graham*,
984 F.2d 1350 (3d Cir. 1993) 13

Allied-Bruce Terminix Cos. v. *Dobson*,
513 U.S. 265 (1995) 20-21

American Nat'l Red Cross v. *S. G.*,
505 U.S. 247 (1992) 19

Arbaugh v. *Y&H Corp.*,
546 U.S. ___ (2006) ..... *passim*

Baldwin v. *Iowa State Traveling Men's Ass'n*,
283 U.S. 522 (1931) 43

Barr v. *Matteo*,
360 U.S. 564 (1959) 27

Bell v. *Hood*,
327 U.S. 678 (1946) 5, 16, 26, 33

Beneficial Nat'l Bank v. *Anderson*,
539 U.S. 1 (2003) 19

Blackburn v. *UPS, Inc.*,
179 F.3d 81 (3rd Cir. 1999) 12

Blue Chip Stamps v. *Manor Drug Stores*,
421 U.S. 723 (1975) 6

Briscoe v. *Bell*,
432 U.S. 404 (1977) 13

Burford v. *Sun Oil Co.*,
319 U.S. 315 (1943) 36

C.I.R. v. *Sunnen*,
333 U.S. 591 (1948) 43

Carnegie-Mellon Univ. v. *Cohill*,
484 U.S. 343 (1988) ..... *passim*

Caterpillar Inc. v. *Lewis*,
519 U.S. 61 (1996) 12

Chicot County Drainage Dist. v. *Baxter State Bank*,
308 U.S. 371 (1940) 45

Cohen v. *Beneficial Industrial Loan Corp.*,
337 U.S. 541 (1949) 44

In re Continental Cas. Co.,
29 F.3d 292 (7th Cir. 1994) 12

Dalrymple v. *Grand River Dam Auth.*,
145 F.3d 1180 (10th Cir. 1998) 15

Davis v. *Michigan Dep't of Treasury*,
489 U.S. 803 (1989) 25

Dudek v. *Prudential Secs., Inc.*,
295 F.3d 875 (8th Cir. 2002) 33

Dura Pharms., Inc. v. *Broudo*,
125 S. Ct. 1627 (2005) 1

El Paso Natural Gas Co. v. *Neztsosie*,
526 U.S. 473 (1999) 27

Fauntleroy v. *Lum*,
210 U.S. 230 (1908) 28

Ferrari, Alvarez, Olsen & Ottoboni v. *Home Ins. Co.*,
940 F.2d 550 (9th Cir. 1991) 15

Fong Foo v. *United States*,
369 U.S. 141 (1962) 14

Franchise Tax Bd. v. *Construction Lab. Vac. Trust*,
463 U.S. 1 (1983) 28, 33

Gold-Washing & Water Co. v. *Keyes*,
96 U.S. 199 (1878) 29

Gozlon-Peretz v. *United States*,
498 U.S. 395 (1991) 21

Gravitt v. *Southwestern Bell Tel. Co.*,
430 U.S. 723 (1977) 11, 38, 40

Greenwood v. *Peacock*,
384 U.S. 808 (1966) 33

Gutierrez de Martinez v. *Lamagno*,
515 U.S. 417 (1995) 9, 17, 34

Hartford Fire Ins. Co. v. *California*,
509 U.S. 764 (1993) 28

Hilton v. *South Carolina Pub. Rys. Comm'n*,
502 U.S. 197 (1991) 39

INS v. *National Ctr. for Immigrants' Rights, Inc.*,
502 U.S. 183 (1991) 21

Izumi Seimitsu Kogyo Kabushiki Kaisha v. *U.S. Philips Corp.*,
510 U.S. 27 (1993) 31

Jama v. *ICE*,
543 U.S. 335 (2005) 21

Jamison v. *Wiley*,
14 F.3d 222 (4th Cir. 1994) 34

In re Janus Mut. Funds Inv. Litig.,
310 F. Supp. 2d 1359 (J.P.M.L. 2004) 3

Jefferson County v. *Acker*,
527 U.S. 423 (1999) ..... *passim*

Johnson Co. v. *Wharton*,
152 U.S. 252 (1894) 45

Kelly v. *Robinson*,
479 U.S. 36 (1986) 24

King v. *St. Vincent's Hosp.*,
502 U.S. 215 (1991) 23

Kontrick v. *Ryan*,
540 U.S. 443 (2004) 5, 16

Levering & Garrigues Co. v. *Morrin*,
289 U.S. 103 (1933) 29

Liberty Mut. Ins. Co. v. *Wetzel*,
424 U.S. 737 (1976) 7, 13, 14, 15

Lindsey v. *Dillard's, Inc.*,
306 F.3d 596 (8th Cir. 2002) 15

Lousiville & Nashville Ry. Co. v. *Mottley*,
211 U.S. 149 (1908) 16

McLaughlin Bros. v. *Hallowell*,
228 U.S. 278 (1913) 46

Mangold v. *Analytic Servs., Inc.*,
77 F.3d 1442 (4th Cir. 1996) 15

Martin v. *Franklin Capital Corp.*,
126 S. Ct. 704 (2005) 35

Merrill Lynch, Pierce, Fenner & Smith, Inc. v. *Dabit*,
547 U.S. ___ (2006) ..... *passim*

Mesa v. *California*,
489 U.S. 121 (1989) 16, 25, 28, 33

Midlantic Nat'l Bank v. *New Jersey Dep't of Envtl. Prot.*,
474 U.S. 494 (1986) 40

Missouri Pac. Ry. Co. v. *Fitzgerald*,
160 U.S. 556 (1896) 46

Moses H. Cone Mem'l Hosp. v. *Mercury Constr. Corp.*,
460 U.S. 1 (1983) 44

In re Mut. Funds Inv. Litig.,
384 F. Supp. 2d 845 (D. Md. 2005) 3

Nashville, Chattanooga & St. Louis Ry. v. *Wallace*,
288 U.S. 249 (1933) 13

Norton v. *Mathews*,
427 U.S. 524 (1976) 30

Oklahoma Tax Comm'n v. *Graham*,
489 U.S. 838 (1989) 19

Oneida Indian Nation v. *County of Oneida*,
414 U.S. 661 (1974) 26

Osborn v. *Bank of United States*,
22 U.S. (9 Wheat.) 738 (1824) 33

Quackenbush v. *Allstate Ins. Co.*,
517 U.S. 706 (1996) ..... *passim*

Railroad Co. v. *Mississippi*,
102 U.S. 135 (1880) 29

Riley v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*,
292 F.3d 1334 (11th Cir.), *cert. denied*,
537 U.S. 950 (2002) 2

Romero v. *International Term. Oper. Co.*,
358 U.S. 354 (1959) 24

Rowinski v. *Salomon Smith Barney Inc.*,
398 F.3d 294 (3d Cir. 2005) 38

Ruhrgas AG v. *Marathon Oil Co.*,
526 U.S. 574 (1999) 14, 34, 45

Salinas v. *United States*,
522 U.S. 52 (1997) 20

Scarborough v. *Principi*,
541 U.S. 401 (2004) 5, 16

Schweiker v. *Hogan*,
457 U.S. 569 (1982) 44

SEC v. *Zandford*,
535 U.S. 813 (2002) 30

Semtek Int'l Inc. v. *Lockheed Martin Corp.*,
531 U.S. 497 (2001) 45

Skelly Oil Co. v. *Phillips Petroleum Co.*,
339 U.S. 667 (1950) 33

Snapper, Inc. v. *Redan*,
171 F.3d 1249 (11th Cir. 1999) 12

St. Paul Mercury Indem. Co. v. *Red Cab Co.*,
303 U.S. 283 (1938) 34

Steel Co. v. *Citizens for Better Env't*,
523 U.S. 83 (1998) 17, 26, 29, 30

Stoll v. *Gottlieb*,
305 U.S. 165 (1938) 45

Taylor v. *Freeland & Kronz*,
503 U.S. 638 (1992) 12

Tennessee v. *Union & Planters' Bank*,
152 U.S. 454 (1894) 16

Thermtron Prods., Inc. v. *Hermansdorfer*,
423 U.S. 336 (1976) ..... *passim*

Things Remembered, Inc. v. *Petrarca*,
516 U.S. 124 (1995) ..... *passim*

Trans Penn Wax Corp. v. *McCandless*,
50 F.3d 217 (3d Cir. 1995) 35

Underwriters Nat'l Assur. Co. v. *North Carolina Life & Accident & Health Ins. Guar. Ass'n*, 455 U.S. 691 (1982) 45

United States v. *Cotton*, 535 U.S. 625 (2002) 31

United States v. *Jorn*, 400 U.S. 470 (1971) 14

United States v. *Martin Linen Supply Co.*, 430 U.S. 564 (1977) 7, 14

United States v. *Munsingwear, Inc.*, 340 U.S. 36 (1950) 45

United States v. *O'Hagan*, 521 U.S. 642 (1997) 30

United States v. *Rice*, 327 U.S. 742 (1946) 43

United States v. *Ruiz*, 536 U.S. 622 (2002) 28

United States v. *Sisson*, 399 U.S. 267 (1970) 7, 14, 15

UPS, Inc. v. *Mitchell*, 451 U.S. 56 (1981) 39

Verlinden B.V. v. *Central Bank of Nigeria*, 461 U.S. 480 (1983) 9, 18, 32, 33

Waco v. *United States Fid. & Guar. Co.*, 293 U.S. 140 (1934) ..... *passim*

Will v. *Hallock*, 126 S. Ct. 952 (2006) 44

Willingham v. *Morgan*, 395 U.S. 402 (1969) ..... *passim*

Yankaus v. *Feltenstein*, 244 U.S. 127 (1917) 46

Yee v. *City of Escondido*,
503 U.S. 519 (1992) 12

Statutes

Class Action Fairness Act of 2005, Pub. L. No.
109-2, 119 Stat. 4 ..... 21, 40

Private Securities Litigation Uniform Standards
Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 1

Securities Act of 1933, 15 U.S.C. § 77a *et seq.* (as
amended) 1

15 U.S.C. § 77p 3

15 U.S.C. § 77p(b) 2, 18-19

15 U.S.C. § 77p(c) ..... *passim*

15 U.S.C. § 77p(d)(1) 2

15 U.S.C. § 77p(d)(2) 2

15 U.S.C. § 77p(d)(3) 3

15 U.S.C. § 77p(d)(4) 35

15 U.S.C. § 77p(e) 2

15 U.S.C. § 77p(f)(2) 2

15 U.S.C. § 77p(f)(2)(A) 29

15 U.S.C. § 77p(f)(2)(B) 2

15 U.S.C. § 77p(f)(3) 2

15 U.S.C. § 77r(b) 2

15 U.S.C. § 77z-1(a)(3) 1

15 U.S.C. § 77z-1(b) 1

15 U.S.C. § 77z-1(b)(1) 41

15 U.S.C. § 77z-1(b)(4) 41

15 U.S.C. § 77z-1(c) 2

15 U.S.C. § 77z-2(c) 2

Securities Exchange Act of 1934, 15 U.S.C. § 78a *et seq.* (as amended) 1

15 U.S.C. § 78bb(f) 3

15 U.S.C. § 78bb(f)(3)(D) 35

15 U.S.C. § 78u-4(a)(3) 1

15 U.S.C. § 78u-4(b)(1) 1

15 U.S.C. § 78u-4(b)(3) 1

15 U.S.C. § 78u-4(b)(3)(B) 41

15 U.S.C. § 78u-4(b)(3)(D) 41

15 U.S.C. § 78u-4(c) 2

15 U.S.C. § 78u-5(c) 2

Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, 112 Stat. 3227 2

18 U.S.C. § 3731 14

28 U.S.C. § 1291 ..... 10, 11

28 U.S.C. § 1332(d)(2) 40

28 U.S.C. § 1367(c) 34

28 U.S.C. § 1442 25

28 U.S.C. § 1442(a)(3) 27

28 U.S.C. § 1447(c) ..... *passim*

28 U.S.C. § 1447(d) ..... *passim*

28 U.S.C. § 1452(b) 39

28 U.S.C. § 1453(d)(1) 21

Other Authorities

H.R. Conf. Rep. No. 369,
104th Cong., 1st Sess. (1995) 1, 2

H.R. Conf. Rep. No. 803,
105th Cong., 2d Sess. (1998) 2, 37

H.R. Rep. No. 640,
105th Cong., 2d Sess. (1998) 21, 22, 27, 35

S. Rep. No. 182,
105th Cong., 2d Sess. (1998) 2, 21, 27

Securities Litigation Abuses: Hearing Before the Subcomm. on Secs., Comm. on Banking, Housing & Urban Affairs, 1997 WL 687807 23-24

16 *Moore's Federal Practice* § 107.44[2][a] (3d ed. 2005) 41

Morris & Goss, *Why Claims Under the Securities Act of 1933 Are Removable to Federal Court*, 36 Sec. Reg. & L. Rep. (BNA) 626 (2004) 20

5A Wright & Miller, *Federal Practice & Procedure* § 1350 (2d ed. 1990) 26

14C Wright & Miller, *Federal Practice & Procedure* § 3739 (3d ed. 1998) 34

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BRIEF FOR RESPONDENTS

Respondents respectfully submit that the judgment of the court of appeals should be affirmed.

STATEMENT

After removal, the district court held that petitioners' state-law claims are not precluded by the Securities Litigation Uniform Standards Act of 1998 (SLUSA). The court of appeals held that it had jurisdiction to review the district court's resolution of the SLUSA issue, then reversed and remanded with directions to dismiss petitioners' claims pursuant to SLUSA.

1. In 1995 and 1998, Congress enacted two statutes that, together, sought to regularize private enforcement of the securities laws at the federal level and to significantly limit private securities litigation at the state level. Both statutes amended the two principal pillars of federal securities law: the Securities Act of 1933, 15 U.S.C. §§ 77a *et seq.*, and the Securities Exchange Act of 1934, 15 U.S.C. §§ 78a *et seq.*

a. The Private Securities Litigation Reform Act of 1995 (PSLRA), Pub. L. No. 104-67, 109 Stat. 737, was enacted to "implement[] needed procedural protections to discourage frivolous litigation." H.R. Conf. Rep. No. 369, 104th Cong., 1st Sess. 32 (1995). Congress concluded that the "private securities litigation system is too important to the integrity of American capital markets to allow this system to be undermined by those who seek to line their own pockets by bringing abusive and meritless suits." *Id.* at 31.

The PSLRA imposes rigorous pleading requirements on plaintiffs in federal securities suits. 15 U.S.C. § 78u-4(b)(1), (2); *see Dura Pharms., Inc.* v. *Broudo*, 125 S. Ct. 1627, 1633 (2005). It also imposes an automatic stay of discovery during the pendency of motions to dismiss (15 U.S.C. §§ 77z-1(b), 78u-4(b)(3)), constrains who can serve as lead plaintiff in a securities class action (15 U.S.C. §§ 77z-1(a)(3), 78u-4(a)(3)), and authorizes sanctions for frivolous litigation (15

U.S.C. §§ 77z-1(c), 78u-4(c)). In addition to these procedural reforms, the PSLRA also establishes a "safe harbor" for forward-looking statements, to encourage issuers to disseminate relevant information to the market without fear of open-ended liability. H.R. Conf. Rep. No. 369, *supra*, at 32; *see* 15 U.S.C. §§ 77z-2(c), 78u-5(c).

b. SLUSA, Pub. L. No. 105-353, 112 Stat. 3227, was enacted "in order to prevent certain State private securities class action lawsuits alleging fraud from being used to frustrate the objectives of the [PSLRA]." SLUSA § 2 (App. to Pet. Br. 15a). "[S]tate-court class actions involving nationally traded securities were virtually unknown" when the PSLRA was enacted. S. Rep. No. 182, 105th Cong., 2d Sess. 4 (1998). But "the decline in federal securities class action suits that occurred after the passage of the PSLRA was accompanied by a nearly identical increase in state court filings." *Riley* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 292 F.3d 1334, 1341 n.12 (11th Cir.), *cert. denied*, 537 U.S. 950 (2002). Congress determined that "[t]he solution to this problem is to make Federal court the exclusive venue for most securities fraud class action litigation involving nationally traded securities." H.R. Conf. Rep. No. 803, 105th Cong., 2d Sess. 15 (1998).

SLUSA precludes any court from hearing a state-law "covered class action" alleging fraud or manipulation in connection with the purchase or sale of a "covered security." 15 U.S.C. § 77p(b). SLUSA also authorizes removal of "[a]ny" covered class action "involving" covered securities, as set forth in the preclusion provision. 15 U.S.C. § 77p(c). A covered class action is one that seeks damages on behalf of 50 or more persons. 15 U.S.C. § 77p(f)(2). Covered securities include mutual fund shares. 15 U.S.C. §§ 77p(f)(3), 77r(b). Expressly excluded from SLUSA's preclusive reach are derivative actions (15 U.S.C. § 77p(f)(2)(B)), actions under the law of the State of incorporation involving proxy solicitations (15 U.S.C. § 77p(d)(1)), actions by States or their securities commissioners (15 U.S.C. §§ 77p(d)(2), 77p(e)),

and actions between an issuer and indenture trustee (15 U.S.C. § 77p(d)(3)).[1]

2. Petitioners are individuals who allegedly purchased shares in mutual funds or their equivalents offered or advised by respondents. *See* Resp. C.A. Br. 1 n.1, 6 n.3. Petitioners filed these putative class actions in Illinois state court (in the circuit courts for Madison and St. Clair Counties), alleging that respondents had engaged in an undisclosed practice of facilitating "market timing"—a term that petitioners use to mean frequent trading of mutual fund shares to take advantage of price arbitrage opportunities in funds holding internationally traded securities. *See* Pet. Br. 6-7.[2]

Petitioners alleged that respondents marketed mutual funds as long-term investments, but then "exposed long term shareholders to market timing traders" by "failing to make daily adjustments" to the value of portfolio securities traded on foreign exchanges. J.A. 174 (*Potter*). Petitioners alleged that respondents thereby "g[a]ve market timing traders the opportunity to earn vastly higher returns at no additional risk," and that these "excess profits . . . c[a]me at the expense of fellow shareholders." *Id.* at 176, 177. Alleging that respondents had facilitated this course of conduct without disclosing it to other investors, petitioners sought damages (including punitive damages) and other relief on behalf of all

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[1] With one exception (*see* note 13, *infra*), SLUSA's amendments to the 1933 Act (15 U.S.C. § 77p) parallel those to the 1934 Act (15 U.S.C. § 78bb(f)). Both petitioners (Pet. Br. 5 n.1) and the court of appeals (Pet. App. 3a, 11a) refer only to the 1933 Act codification; for consistency, respondents will generally do the same.

[2] More than 400 lawsuits alleging "market timing" in various mutual funds, including some of respondents' funds, have been transferred for coordinated proceedings in the District of Maryland. *See In re Janus Mut. Funds Inv. Litig.*, 310 F. Supp. 2d 1359 (J.P.M.L. 2004). That court has held state-law claims analogous to petitioners' precluded by SLUSA. *In re Mut. Funds Inv. Litig.*, 384 F. Supp. 2d 845, 871-72 (D. Md. 2005).

investors who "held" shares in respondents' mutual funds for more than 14 days. *Id.* at 180-84; *see also id.* at 192, 197-200 (*Kircher*); 218, 223-26 (*Parthasarthy*); 244, 249-52 (*Dudley I*); 262, 267-70 (*Dudley II*); 279, 284-87 (*Vogeler*); 296, 301-03 (*Jackson*); 316-18 (*Spurgeon*).

Respondents removed the cases to the United States District Court for the Southern District of Illinois, asserting (*inter alia*) that "[t]he Court has subject matter jurisdiction over this action pursuant to SLUSA." J.A. 360 (*Potter*). Respondents alleged that each aspect of the preclusion defense was met because "this action is a covered class action," petitioners had sued under state law, mutual fund securities are "covered securities," and petitioners' "claims are 'in connection with' the purchase or sale of a covered security because they are based upon statements and alleged manipulative conduct relating to the value and nature of securities sold or consideration received." *Id.* at 360-61; *see also id.* at 331-36, 337-40 (*Parthasarthy*); 341-57 (*Kircher*); 369-72 (*Vogeler*); 373-89 (*Dudley I*); 390-406 (*Dudley II*); 407-12 (*Jackson*); 413-35 (*Spurgeon*). Based on these allegations, respondents concluded that "SLUSA mandates that this action be removed to federal court." *Id.* at 362.

Petitioners' sole objection to removal under SLUSA was that the "in connection with" requirement was not met because the putative classes were comprised of "holders," rather than purchasers or sellers, of mutual fund shares. Pet. App. 6a. In a series of similar orders, the district court concluded that because petitioners ostensibly were suing on behalf of "holders," their claims would not be "cognizable under the 1934 Act"; on that basis, the district court held that "SLUSA does not preempt them." Pet. App. 61a (*Spurgeon*); *see also id.* at 26a-27a (*Kircher*); 30a (*Dudley I*); 39a-40a (*Parthasarthy*); 43a-45a (*Potter*); 50a-51a (*Vogeler*), 56a-57a (*Jackson*). Having rejected respondents' federal defense on the merits, the district court remanded the cases to state court. In each case, the court stated that it was remanding for lack of subject-matter jurisdiction. *See* Pet. Br. 13 & n.22.

3. Respondents appealed the rejection of their SLUSA-preclusion defense to the Seventh Circuit, which issued two opinions by different three-judge panels.

a. The court of appeals (*Easterbrook*, Evans and Williams, JJ.) first determined that it had jurisdiction to consider respondents' appeal. Pet. App. 10a-17a. The court recognized that 28 U.S.C. § 1447(d) precludes appellate review of remand orders that are based on § 1447(c). *Id.* at 12a (citing *Thermtron Prods., Inc.* v. *Hermansdorfer*, 423 U.S. 336 (1976), and *Things Remembered, Inc.* v. *Petrarca*, 516 U.S. 124 (1995)). The court ruled, however, that a remand under SLUSA "is not within § 1447(c) or equivalent to it, for [it] comes at the end rather than the outset of federal adjudication." *Id.* at 13a. As the court noted, "[t]he Supreme Court has itself reviewed remand decisions that fall outside the scope of § 1447(c)." *Ibid.* (citing *Thermtron*; *Quackenbush* v. *Allstate Ins. Co.*, 517 U.S. 706 (1996); and *Carnegie-Mellon Univ.* v. *Cohill*, 484 U.S. 343 (1988)).

The court of appeals rejected petitioners' contention that a SLUSA-based remand connotes a lack of subject-matter jurisdiction, and thus is governed by § 1447(c). "[T]he Supreme Court has observed that a court lacks 'subject-matter jurisdiction' only when Congress has not authorized the federal judiciary to resolve the sort of issue presented by the case (or the Constitution forbids adjudication)." Pet. App. 13a (citing *Kontrick* v. *Ryan*, 540 U.S. 443 (2004), and *Scarborough* v. *Principi*, 541 U.S. 401 (2004)). Under SLUSA, "a federal judge is not only authorized but also required to decide whether any court may entertain the litigation," and "[o]nly after making the substantive decision that Congress authorized it to make did the district court remand." *Id.* at 14a. To "say that jurisdiction evaporated at that juncture . . . would be tautological," the court explained, because "[o]therwise every federal suit, having been decided on the merits, would be dismissed 'for lack of jurisdiction' because the court's job was finished." *Ibid.* (citing *Bell* v. *Hood*, 327 U.S. 678 (1946)).

b. In its second decision, the court of appeals (*Easterbrook*, Ripple and Wood, JJ.) concluded that petitioners' claims are precluded by SLUSA. Pet. App. 1a-9a. Although petitioners "insist[ed] that any private action that is untenable after *Blue Chip Stamps* [v. *Manor Drug Stores*, 421 U.S. 723 (1975),] also is unaffected by SLUSA," the Seventh Circuit held that "[i]t would be more than a little strange if the Supreme Court's decision [in *Blue Chip Stamps*] to block private litigation by non-traders became the opening by which that very litigation could be pursued under state law, despite the judgment of Congress (reflected in SLUSA) that securities class actions must proceed under federal securities law or not at all." Pet. App. 6a-7a, 8a. This Court has expressly approved the Seventh Circuit's merits decision in this case. *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Dabit*, 547 U.S. ___ (2006), slip op. 1, 14.

SUMMARY OF ARGUMENT

Petitioners assert that the Seventh Circuit was stripped of appellate jurisdiction by 28 U.S.C. § 1447(d), which provides that "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise." But that statute does not bar *all* review of remand orders and associated decisions, and it does not apply here.

I. In *Thermtron Products, Inc.* v. *Hermansdorfer*, 423 U.S. 336 (1976), the Court held that § 1447(d) bars appellate review only of remand orders based on the grounds specified in § 1447(c)—defects in removal procedure or lack of subject matter jurisdiction. Because the remand orders in this case were not based on either of these grounds, appellate review was authorized by *Thermtron*, which the Court has repeatedly reaffirmed and implemented. *Things Remembered, Inc.* v. *Petrarca*, 516 U.S. 124 (1995); *Quackenbush* v. *Allstate Ins. Co.*, 517 U.S. 706 (1996).

A. The district court *said* that it was remanding for "lack of subject matter jurisdiction." Petitioners argue that this statement is dispositive in its own right, and correct in any event. They are wrong on both counts.

1. This Court recently observed that courts often label dispositions "jurisdictional" when in fact they are based on a failure to prove some substantive element. *Arbaugh* v. *Y&H Corp.*, 546 U.S. ___ (2006). Such labels have "no precedential effect," and cannot override the federal courts' independent obligation to determine whether appellate jurisdiction exists. *E.g.*, *Liberty Mut. Ins. Co.* v. *Wetzel*, 424 U.S. 737 (1976). In analogous circumstances, this Court has held that the label attached to a district court determination is not controlling for purposes of appellate jurisdiction. *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564 (1977); *United States* v. *Sisson*, 399 U.S. 267 (1970). The label applied by the district court here is, likewise, not controlling.

2. Petitioners' entire case rests on an understanding of the concept of "jurisdiction" that this Court unanimously rejected in *Arbaugh*, which confirmed that subject-matter jurisdiction refers *only* to "the question whether the federal court had authority to adjudicate the claim in suit." Because Congress clearly *authorized* the district court to resolve the substantive question of SLUSA preclusion, the court's ultimate rejection of respondents' federal defense was an *exercise* of jurisdiction, not a determination that jurisdiction was lacking.

a. The Court also held in *Arbaugh* that where Congress does not expressly make a statutory requirement jurisdictional, the courts should treat it as non-jurisdictional. Under that standard, the elements of SLUSA preclusion are not jurisdictional because SLUSA's removal provision is broader than its preclusion provision, such that some actions are removable even if they are not precluded. The text of the removal provision authorizes removal of "any" covered class action "involving" covered securities as set forth in the preclusion provision. These terms of inclusion show that Congress intended the removal provision to be broader than the preclusion provision, which is confirmed by the legislative history. Thus, in *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Dabit*, 547 U.S. ___ (2006), this Court read SLUSA as authorizing removal of *all* "covered class actions," regardless of whether such actions are precluded. The final clause of

the removal provision, which states that removed actions "shall be subject" to the preclusion provision, provides further structural proof that the removal provision is broader than the preclusion provision; if they were coterminous, this final clause would be redundant or superfluous. Congress made the removal provision sweep wider than the preclusion provision to ensure that federal courts would make the substantive determination whether a particular action is precluded by SLUSA.

b. Where Congress has made state-law claims removable on the basis of a federal defense, this Court has held that the federal courts have jurisdiction if the removing defendants establish a "colorable" (non-frivolous) federal defense, based on the defendants' theory of the case at the time of removal, even if that defense is ultimately rejected on the merits. For example, the Court has rejected a "narrow, grudging" interpretation of the federal officer removal statute that would require the officer to prove the federal defense in order to remove the case. *Jefferson County* v. *Acker*, 527 U.S. 423 (1999); *Willingham* v. *Morgan*, 395 U.S. 402 (1969). Congress enacted SLUSA against this established background principle, and thus is presumed to have understood that a district court has removal jurisdiction if the removing defendants establish a colorable defense of preclusion at the time of removal. Certainly, petitioners provide no justification for treating "jurisdiction" under SLUSA differently than this Court has done in other statutory contexts.

c. Where a case is removable on the basis of a federal defense, the courts look to the removal papers to establish the bases for federal jurisdiction. Here, respondents established that their SLUSA preclusion defense was colorable; indeed, petitioners conceded all of the elements but one. The sole argument advanced by petitioners—that an action by "holders" can never satisfy the "in connection with" requirement—was unanimously rejected by this Court in *Dabit*. Respondents' position on this issue was perforce colorable; the district court therefore had subject-matter jurisdiction at the time of removal.

d. The existence of a substantial federal defense of SLUSA preclusion is sufficient to invest the court with jurisdiction over the entire action, even if the defense is ultimately rejected. *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480 (1983); *Gutierrez de Martinez* v. *Lamagno*, 515 U.S. 417 (1995) (plurality). But because the surviving claims will predominantly (if not entirely) involve state law, the court has the discretionary authority to remand the case to state court. *Carnegie-Mellon Univ.* v. *Cohill*, 484 U.S. 343 (1988). Under *Thermtron*, as applied in *Quackenbush*, such a discretionary remand order is appealable because it is not based on one of the grounds in § 1447(c). Accordingly, the Seventh Circuit correctly exercised appellate jurisdiction over the remand orders in this case.

B. Allowing appellate review of SLUSA decisions would further the statutory objective of uniformity. Petitioners do not contend otherwise; rather, they argue that affirmance would frustrate the policies of § 1447(d). This is an attack on *Thermtron* itself; but *Thermtron* has been settled law for three decades. Congress is presumed to have been aware of the *Thermtron* rule, and thus to have understood that non-jurisdictional SLUSA decisions would be appealable. Adherence to that well-settled rule compels affirmance of the decision below.

II. The decision below could be affirmed on the alternative ground that appellate review was authorized by *Waco* v. *United States Fidelity & Guaranty Co.*, 293 U.S. 140 (1934). In *Waco*, this Court held that the statutory bar on appellate review of remand orders does not apply to an otherwise appealable antecedent decision that would be conclusive in the remanded action. The district court's decision that petitioners' actions are not precluded under SLUSA is reviewable under the *Waco* doctrine, because that decision is both immediately appealable and would not be subject to reconsideration or appeal on remand. Petitioners have failed even to address the *Waco* doctrine in their principal brief.

ARGUMENT

"Because it ends the litigation in federal court, a remand is a 'final decision' that may be appealed under 28 U.S.C. § 1291." Pet. App. 12a (citing *Quackenbush* v. *Allstate Ins. Co.*, 517 U.S. 706, 711-15 (1996)); *see* note 3, *infra*. Thus, to prevail on the question presented, petitioners must establish that some *other* statute precluded the court below from exercising the appellate jurisdiction conferred on it by Congress in § 1291.

Petitioners place sole reliance on 28 U.S.C. § 1447(d), which provides that "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise." *See* Pet. Br. 24. But § 1447(d) does not preclude *all* appellate review of remand orders and associated decisions. As the court below correctly held, the orders in this case are reviewable under *Thermtron Products, Inc.* v. *Hermansdorfer*, 423 U.S. 336 (1976), because the district court's remand decisions were not based on a defect in removal procedure or a lack of subject-matter jurisdiction. Moreover, the orders in this case are also reviewable under *Waco* v. *United States Fidelity & Guaranty Co.*, 293 U.S. 140 (1934), because the district court's antecedent decision on the applicability of SLUSA would be functionally unreviewable in the state-court proceedings.

I. The Seventh Circuit Properly Exercised Appellate Jurisdiction Under *Thermtron*

In *Thermtron*, this Court held that "only remand orders issued under § 1447(c) and invoking the grounds specified therein ... are immune from [appellate] review under § 1447(d)." 423 U.S. at 346. Since *Thermtron*, the Court has reiterated that "§ 1447(d) must be read *in pari materia* with § 1447(c), so that only remands based on grounds specified in § 1447(c) are immune from review under § 1447(d)." *Things Remembered, Inc.* v. *Petrarca*, 516 U.S. 124, 127 (1995); *see also Quackenbush*, 517 U.S. at 711-12 (same).

Under the *Thermtron* rule, remand orders based on grounds specified in § 1447(c)—lack of subject-matter jurisdiction and defects in removal procedure—are not appealable. Thus, § 1447(d) bars appellate review where the district court remands for lack of complete diversity. *Gravitt* v. *Southwestern Bell Tel. Co.*, 430 U.S. 723, 723 (1977) (per curiam). A remand based on a procedural defect, such as an untimely removal, is likewise unreviewable. *Things Remembered*, 516 U.S. at 128.

Also under *Thermtron*, remand orders based on grounds *not* specified in § 1447(c) may be reviewed on appeal. For example, the abstention doctrines are not within the scope of § 1447(c), and a remand order based on one of those doctrines is appealable. *Quackenbush*, 517 U.S. at 712. Similarly, the congestion of a district court's docket is not within the scope of § 1447(c), and a remand order based on that factor is reviewable on appeal. *Thermtron*, 423 U.S. at 351.[3]

Because the remand orders in this case were not based on any ground specified in § 1447(c), the Seventh Circuit properly exercised appellate jurisdiction to review those orders under the rule announced in *Thermtron*, adhered to in *Things Remembered*, and followed in *Quackenbush*.

A. The Remand Orders Were Not Based On A Lack Of Subject-Matter Jurisdiction

According to petitioners, the remand orders fall within § 1447(d)'s bar to appellate review because the district court

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[3] The remand order in *Thermtron* was reviewed on writ of mandamus because the Court was of the view that "an order remanding a removed action does not represent a final judgment reviewable by appeal" under 28 U.S.C. § 1291. 423 U.S. at 352-53. This aspect of *Thermtron* was "disavow[ed]" in *Quackenbush* (517 U.S. at 715), which held that a remand order is a final decision appealable under § 1291 because "[w]hen a district court remands a case to a state court, the district court disassociates itself from the case entirely, retaining nothing of the matter on the federal court's docket." *Id.* at 714.

said that its remand orders were based on a "lack[of] subject matter jurisdiction." Pet. App. 12a. Petitioners argue, first, that the district court's jurisdictional label is "dispositive"; and second, that the district court "correctly concluded that [it] lacked subject-matter jurisdiction." Pet. Br. 24 & n.31.[4] Petitioners are wrong on both counts.

1. The Jurisdictional Label Used By The District Court Is Not Conclusive

This Court very recently observed that judicial opinions often recite "that the court is dismissing for 'lack of jurisdiction' when some threshold fact has not been established, without explicitly considering whether the dismissal should be for lack of subject matter jurisdiction or for failure to state a claim." *Arbaugh* v. *Y&H Corp.*, 546 U.S. ___ (2006), slip op. 9 (internal quotation omitted). In *Arbaugh*, the Court made clear that such "'drive-by jurisdictional rulings' ...

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[4] Although petitioners suggest, half-heartedly, that the remand orders could be held unreviewable as based on a "defect" other than subject-matter jurisdiction (Pet. Br. 20 n.24, 34 n.43), the 1996 amendment to § 1447(c) on which they rely has "no effect on the scope of remands authorized by § 1447(c), and therefore no effect on the scope of remand orders with respect to which § 1447(d) bars appellate review." *Snapper, Inc.* v. *Redan*, 171 F.3d 1249, 1259-60 (11th Cir. 1999); *see* Public Citizen Br. 5 n.2. Respondents established in the district court that there was no "defect" within the meaning of § 1447(c) (*see* J.A. 359-60 (*Potter*)), and petitioners did not timely claim otherwise; thus, the case could not have been remanded on that basis. *See Caterpillar Inc.* v. *Lewis*, 519 U.S. 61, 69 (1996); *Blackburn* v. *UPS, Inc.*, 179 F.3d 81, 90 n.3 (3d Cir. 1999). And even if the district court *had* remanded on the basis of a "defect" not timely raised by petitioners, appellate review of such a remand order is *not* barred by § 1447(d). *In re Continental Cas. Co.*, 29 F.3d 292, 294-95 (7th Cir. 1994). In any event, because petitioners failed even to mention their "defect" theory to the Seventh Circuit or in their certiorari petition, it may not be raised by petitioners for the first time in their merits briefing. *See, e.g., Taylor* v. *Freeland & Kronz*, 503 U.S. 638, 646 (1992); *Yee* v. *City of Escondido*, 503 U.S. 519, 537 (1992).

should be accorded 'no precedential effect' on the question whether the federal court had the authority to adjudicate the claim in suit." *Id.* at 9-10. Nothing in this Court's precedents requires courts to take precisely the opposite approach in the context of remand orders. To the contrary, the rule of blind deference petitioners propose directly conflicts with this Court's admonition that the federal courts must independently determine whether appellate jurisdiction exists in a given case (*Liberty Mut. Ins. Co.* v. *Wetzel*, 424 U.S. 737, 740 (1976))—a determination that requires an evaluation of the *substance* of the district court's decision. *Nashville, Chattanooga & St. Louis Ry.* v. *Wallace*, 288 U.S. 249, 259 (1933) ("In determining whether this litigation presents a case within the appellate jurisdiction of this Court, we are concerned, not with form, but with substance").

To be sure, "[i]f a trial judge purports to remand a case on the ground" that it lacked subject-matter jurisdiction, that jurisdictional ruling is unreviewable "whether erroneous or not." *Thermtron*, 423 U.S. at 343; *see Briscoe* v. *Bell*, 432 U.S. 404, 413 n.13 (1977) (dictum). But in determining what the district court "purported" to do, the appellate court must look beyond the *label* affixed to the district court's ruling. *See Things Remembered*, 516 U.S. at 134 (Ginsburg, J., concurring) ("it 'make[s] little sense' to rest reviewability *vel non* on the tag the trial court elects to place on its ruling"). Petitioners concede that a district court may not insulate a non-jurisdictional remand from appellate review by giving it a "patently unreasonable" jurisdictional label (Pet. Br. 28 n.34), but they offer no convincing reason that an appellate court should nonetheless be bound by some less egregious (but incorrect) jurisdictional label. *See Thermtron*, 423 U.S. at 357 (Rehnquist, J., dissenting). Even in close cases, the appellate courts have an obligation to determine whether a remand order was *actually* based on a lack of subject-matter jurisdiction or something else. *See Aliota* v. *Graham*, 984 F.2d 1350, 1354-57 (3d Cir. 1993) (Alito, J.).

Contrary to petitioners' contention, testing the label applied by the district court hardly renders § 1447(d) a "nul-

lity." Pet. Br. 28 n.34. Determining whether the *actual* basis for a district court's remand was "jurisdictional" does not violate § 1447(d) because it does not require a court of appeals to review the correctness of the district court's remand order. Here, for example, the court of appeals determined that the remand orders were not "jurisdictional" before it even *addressed* the district court's substantive analysis of SLUSA preclusion. Pet. App. 17a. In the vast majority of cases, there will be no incongruity between a remand order's substance and its label; after all, "in most instances subject-matter jurisdiction will involve no arduous inquiry." *Ruhrgas AG* v. *Marathon Oil Co.*, 526 U.S. 574, 587 (1999). But where such an incongruity does arise, the appellate courts must ensure that the district court correctly understood its own jurisdiction. *Cf. Liberty Mut. Ins. Co.*, 424 U.S. at 743-44 (where district court lacked authority to enter a Rule 54(b) judgment, appellate jurisdiction was lacking "despite the fact that the [court] undoubtedly made the findings required by the Rule").

This is not the first time that the Court has considered whether a district court's label is conclusive for purposes of appellate jurisdiction. The Double Jeopardy Clause and 18 U.S.C. § 3731 preclude review of a judgment of acquittal in a criminal case, even if the court of appeals believes that the district court's ruling "was based upon an egregiously erroneous foundation." *Fong Foo* v. *United States*, 369 U.S. 141, 143 (1962). In applying this bar on appealability, this Court has instructed that "what constitutes an 'acquittal' is not to be controlled by the form of the judge's action." *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977). Rather, a court of appeals "must determine whether the ruling of the judge, whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged." *Ibid.*; *see also United States* v. *Jorn*, 400 U.S. 470, 478 n.7 (1971) ("the trial judge's characterization of his own action cannot control the classification of the action for purposes of our appellate jurisdiction"); *United States* v. *Sisson*, 399 U.S. 267, 279 n.7 (1970)

("The label attached by the District Court to its own opinion does not, of course, decide for us the jurisdictional issue"). Just as a court of appeals may question a district court's labeling of its judgment as an "acquittal" without violating the bar on appeals of even erroneous acquittals, a court of appeals may question a district court's labeling of its remand order as "jurisdictional" without violating the bar on appeals of even erroneous jurisdictional remands.

Not surprisingly, the courts of appeals have generally recognized that "powerful policy considerations and persuasive decisional authority" support their obligation to independently determine the basis for a district court's remand order before holding that § 1447(d) bars an appeal. *Mangold* v. *Analytic Servs., Inc.*, 77 F.3d 1442, 1450-51 (4th Cir. 1996); *see also, e.g* , *Lindsey* v. *Dillard's, Inc.*, 306 F.3d 596, 598 (8th Cir. 2002); *Dalrymple* v. *Grand River Dam Auth.*, 145 F.3d 1180, 1184 (10th Cir. 1998); *Ferrari, Alvarez, Olsen & Ottoboni* v. *Home Ins. Co.*, 940 F.2d 550, 553 (9th Cir. 1991). These courts and others have properly concluded that a district court's incantation of the phrase "subject-matter jurisdiction" is not a sufficient basis for foreclosing an appeal, nor for relieving the courts of appeals of their obligation to serve as interpreters of their own jurisdiction. *See Liberty Mut. Ins. Co.*, 424 U.S. at 742 (holding that the court of appeals had erred in accepting jurisdiction based on the district court's "recital" that a final judgment had been entered).

This Court has explained that it "must be guided in determining the question of appealability of the trial court's action not by the name the court gave [its decision] but by what in legal effect it actually was." *Sisson*, 399 U.S. at 279 n.7 (internal quotation omitted). That principle is equally applicable to the labels attached by district courts to their remand decisions. The legal effect of the district court's decision in this case was to reject the SLUSA-preclusion defense interposed by respondents; as demonstrated below, that was a decision on the merits of a substantial federal question that the court had jurisdiction to decide, *not* a determination that subject-matter jurisdiction was lacking.

2. The Seventh Circuit Correctly Rejected The District Court's Jurisdictional Label

Petitioners' conception of what constitutes a "jurisdictional" ruling was flatly rejected by this Court's unanimous decision in *Arbaugh*. As the court below explained, "a court lacks 'subject-matter jurisdiction' only when Congress has not authorized the federal judiciary to resolve the sort of issue presented by the case . . . ." Pet. App. 13a (citing *Scarborough* v. *Principi*, 541 U.S. 401, 413-14 (2004), and *Kontrick* v. *Ryan*, 540 U.S. 443, 454-55 (2004)). Petitioners contend that "[n]othing in *Kontrick* or *Scarborough* suggests that the district court['s] authority to resolve the preemption issue . . . somehow meant that the court['s] remand orders were not based on a lack of jurisdiction." Pet. Br. 37. But in *Arbaugh*, this Court confirmed that *Kontrick* and *Scarborough* mean *exactly* that: Subject-matter jurisdiction refers *only* to "the question whether the federal court had authority to adjudicate the claim in suit." Slip op. 9-10; *see also* U.S. Br. in *Arbaugh*, at 21-25. Because Congress clearly *authorized* the district court to resolve the substantive federal question of SLUSA preclusion, its ultimate rejection of respondents' federal defense is an *exercise* of jurisdiction, not a determination that jurisdiction was lacking.

It is well-established that removal jurisdiction (*i.e.*, the *authority* to decide the merits of a case removed from state court) extends to all cases as "might" have been brought originally in federal court. *Tennessee* v. *Union & Planters' Bank*, 152 U.S. 454, 461-62 (1894). The federal courts have original jurisdiction of, *inter alia*, cases presenting a federal question that is not "wholly insubstantial" (*Bell* v. *Hood*, 327 U.S. 678, 682 (1946)), and the federal question ordinarily must appear on the face of the complaint. *Lousiville & Nashville Ry. Co.* v. *Mottley*, 211 U.S. 149, 152-54 (1908). This "well-pleaded complaint" rule can be abrogated by statute, and Congress has acted on occasion to make state-law actions removable *solely* on the basis of a substantial federal question presented as a *defense*. *Mesa* v. *California*, 489 U.S. 121, 136-37 (1989). When Congress has done so, it has

always been recognized that the removing defendants need not prove the merits of the defense to invoke the subject-matter jurisdiction of the federal court; rather, such a case is within the removal jurisdiction if the federal defense is "colorable" (non-frivolous). *Jefferson County* v. *Acker*, 527 U.S. 423, 431-33 (1999). If the federal court ultimately rejects the federal question, that is a decision on the merits—*not* a jurisdictional determination. *Steel Co.* v. *Citizens for Better Env't*, 523 U.S. 83, 89 (1998). The court therefore retains jurisdiction to decide the remainder of the case. *Gutierrez de Martinez* v. *Lamagno*, 515 U.S. 417, 435-36 (1995) (plurality opinion). But if state-law claims predominate following the rejection of the federal defense on the merits, the district court ordinarily has the discretion to remand the case to state court. *Carnegie-Mellon Univ.* v. *Cohill*, 484 U.S. 343, 354-55 (1988). Such a remand order is not based on a lack of subject-matter jurisdiction, and thus 28 U.S.C. § 1447(d) is no barrier to appellate review. *Quackenbush*, 517 U.S. at 711-12.

SLUSA follows this established blueprint. Congress expressly waived the well-pleaded complaint rule by making securities class actions removable on the basis of SLUSA's preclusion defense. 15 U.S.C. § 77p(c). The removal provision applies to "[a]ny" covered class action "involving" a covered security as set forth in the preclusion provision, and requires the federal court to "subject" such actions to the preclusion provision upon removal; thus, the removal provision is *broader* than the preclusion provision, such that some actions that are within the removal jurisdiction are not precluded. The touchstone here, as in other contexts, is whether the federal defense is "colorable" at the time of removal; if it is, then the district court has *jurisdiction* even if the defense is ultimately rejected on the merits. The SLUSA-preclusion defense in this case was clearly colorable; indeed, this Court has since sustained respondents' position on the merits. *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Dabit*, 547 U.S. ___ (2006). Accordingly, the district court had subject-matter jurisdiction when the case was removed, and its erro-

neous resolution of the preclusion defense did not serve to divest it of jurisdiction. *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 493 (1983). Its subsequent remand order was therefore discretionary, as authorized by *Cohill*; and the court of appeals properly exercised appellate jurisdiction, as authorized by *Thermtron* and *Quackenbush*.

a. SLUSA's Removal Provision Is Broader Than Its Preclusion Provision

The *Arbaugh* Court adopted a "readily administrable bright line" rule to answer the question "[w]hether a disputed matter concerns jurisdiction or the merits." Slip op. 14 (internal quotation omitted). Under *Arbaugh*'s clear-statement rule, statutory elements are *not* jurisdictional unless Congress *expressly* provides otherwise: "If the Legislature clearly states that a threshold limitation on a statute's scope shall count as jurisdictional, then courts and litigants will be duly instructed and will not be left to wrestle with the issue. . . . But when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional." *Ibid.* (footnote omitted). Under the standard reiterated in *Arbaugh*, the elements of SLUSA preclusion are not jurisdictional.

SLUSA precludes certain securities actions from being maintained in any court:

> No covered class action based upon the statutory or common law of any State or subdivision thereof may be maintained in any State or Federal court by any private party alleging—
>
> (1) an untrue statement or omission of a material fact in connection with the purchase or sale of a covered security; or
>
> (2) that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security.

15 U.S.C. § 77p(b). Although this is often referred to as a "preemption" provision, "SLUSA does not actually pre-empt any state cause of action. It simply denies plaintiffs the right to use the class action device to vindicate certain claims." *Dabit*, slip op. 15.

SLUSA also contains a specialized provision authorizing removal of state-law actions on the basis of a federal defense:

> *Any* covered class action brought in any State court *involving* a covered security, as set forth in subsection (b) of this section, shall be removable to the Federal district court for the district in which the action is pending, *and shall be subject to subsection (b) of this section.*

15 U.S.C. § 77p(c) (emphases added). Congress thereby authorized removal based on the federal *defense* of preclusion. *See Oklahoma Tax Comm'n* v. *Graham*, 489 U.S. 838, 841 (1989) (per curiam) ("Congress has expressly provided by statute for removal when it desired federal courts to adjudicate defenses based on federal immunities").[5]

1. The text and structure of the statute, and its history and purpose, establish that SLUSA's removal provision is broader than its preclusion provision—that is, it confers subject-matter jurisdiction in the federal courts over some claims that are not precluded. It necessarily follows that Congress

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[5] Where Congress has expressly provided for federal jurisdiction by statute, the well-pleaded complaint rule—which ordinarily requires the federal question to appear on the face of the complaint—does not apply. *Cf. American Nat'l Red Cross* v. *S. G.*, 505 U.S. 247, 258 (1992). For the same reason, petitioners' reliance on the "complete preemption" doctrine (Pet. Br. 34-36) is misplaced; that doctrine applies only where Congress has *not* expressly provided for federal jurisdiction. *See Beneficial Nat'l Bank* v. *Anderson*, 539 U.S. 1, 8 (2003) ("a state claim may be removed to federal court in only two circumstances—when Congress expressly so provides, . . . *or* when a federal statute wholly displaces the state-law cause of action through complete pre-emption") (emphasis added).

did not "clearly state[]" that each of the prerequisites to preclusion "shall count as jurisdictional." *Arbaugh*, slip op. 14.

The Seventh Circuit held that SLUSA allows removal of all "covered class actions." Pet. App. 13a-14a ("Because . . . this is a 'covered class action' . . . a federal judge is not only authorized but also required to decide whether any court may entertain the litigation"). Although petitioners complain that this holding is "without any textual basis" (Pet. Br. 37), this Court recently read SLUSA's removal provision precisely as the Seventh Circuit had. In *Dabit*, this Court explained that a "key provision of the statute makes *all* 'covered class actions' filed in state court removable to federal court." Slip op. 10 n.7 (emphasis added).

Contrary to petitioners' suggestion (Pet. Br. 37), neither the *Dabit* Court's footnote nor the Seventh Circuit's holding is inconsistent with the "as set forth in subsection (b)" clause of the removal provision, which petitioners would read to mean that an action cannot be removed unless it conclusively meets all of the prerequisites to preclusion. Pet. Br. 32. "To be sure, the removal provision's reference to the preemption provision is not a model of clarity, but it . . . cannot possibly mean that Congress intended to give the removal provision precisely the same scope as the preemption provision. If the removal provision had the same scope as the preemption provision, it would simply reference that provision in its entirety, or it would track that provision's language exactly. But it does neither." Morris & Goss, *Why Claims Under the Securities Act of 1933 Are Removable to Federal Court*, 36 Sec. Reg. & L. Rep. (BNA) 626, 629 (2004).

Congress chose *not* to repeat the preclusion provision *verbatim* in the removal provision. Instead, Congress conferred removal jurisdiction over "*[a]ny* covered class action . . . *involving* a covered security" as set forth in subsection (b). 15 U.S.C. § 77p(c) (emphases added). These are terms of inclusion, not limitation. *See Salinas* v. *United States*, 522 U.S. 52, 57 (1997) ("The word 'any' . . . undercuts the attempt to impose [a] narrowing construction"); *Allied-Bruce*

Terminix Cos. v. *Dobson*, 513 U.S. 265, 273 (1995) ("the word 'involving' is broad"). Congress's use of these inclusive terms to modify the "as set forth" clause shows that the removal provision is broader than the preclusion provision. Indeed, the very title of the removal provision is "removal of *covered* class actions"—*not* "removal of precluded class actions"—confirming that the removal provision is broader than the preclusion provision. *See INS* v. *National Ctr. for Immigrants' Rights, Inc.*, 502 U.S. 183, 189 (1991).[6]

The section-by-section analyses prepared for each chamber state that subsection (c) "provides that any class action described in [s]ubsection (b) that is brought in a State court *shall* be removable to a Federal district court, and *may* be dismissed pursuant to the provisions of subsection (b)." S. Rep. No. 182, *supra*, at 8 (emphases added); *accord*, H.R. Rep. No. 640, 105th Cong., 2d Sess. 16 (1998). The congressional understanding that an action removed under SLUSA "*may* be dismissed pursuant to the provisions of subsection (b)" necessarily means that some actions *might not* be so dismissed. *Jama* v. *ICE*, 543 U.S. 335, 346 (2005) ("The word 'may' customarily connotes discretion"). In other words, an action might be "described in subsection (b)" for purposes of removal, but *not* precluded by subsection (b).

The final clause of the removal provision—which states that removed actions "shall be subject to subsection (b)"—provides further structural proof that the removal provision is broader than the preclusion provision. If only precluded ac-

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[6] The Class Action Fairness Act of 2005 (CAFA), Pub. L. No. 109-2, 119 Stat. 4, exempts from its removal provision "any class action that solely involves . . . a claim concerning a covered security as defined under [SLUSA]"—*not* just claims precluded by SLUSA. 28 U.S.C. § 1453(d)(1). The 109th Congress thus understood actions "concerning" a covered security to be removable under SLUSA. *See Gozlon-Peretz* v. *United States*, 498 U.S. 395, 406 (1991) (view of a later Congress has "'persuasive value'" in construing prior legislation).

tions could be removed, as petitioners contend, then there would be no need for them to be "subject to" the preclusion provision; they would be precluded simply by virtue of their removability. Under the Seventh Circuit's ruling, by contrast, the district court "subjects" a removed action to the preclusion provision by determining whether the action meets each of the limitations in subsection (b), in which case it may not be maintained in any court as a matter of substantive federal law; if the court ultimately concludes that the action does not fall within subsection (b), then—again as a matter of substantive federal law—the action may be maintained in the court in which it was brought.

Congress included the removal provision to ensure that precluded actions do not proceed in state court. H.R. Rep. No. 640, *supra*, at 16 (removal provision "is designed to prevent a State court from inadvertently, improperly, or otherwise maintaining jurisdiction over an action that is preempted pursuant to subsection (b)"). And Congress made the removal provision sweep wider than the preclusion provision to ensure that the *federal* courts would make the determination whether a particular action is precluded by SLUSA. *Cf. Willingham* v. *Morgan*, 395 U.S. 402, 405 (1969) ("the test for removal should be broader, not narrower, than the test for [the federal defense of] official immunity").

2. Petitioners maintain, however, that "the plain language of SLUSA's removal provision clearly mandates that a class action cannot be removed *unless* that action satisfies SLUSA's preemption provision." Pet. Br. 32 (citation omitted). This reading cannot be reconciled with the text, structure, history, or purpose of the statute.

Petitioners assert that SLUSA "provides for removal of a covered class action if and only if it meets the preemption criteria 'as set forth in subsection (b).'" Pet. Br. 32. The problem with this simplistic argument is that SLUSA does *not* say that a case can be removed "if and only if" all requirements for preclusion are met. The removal provision *actually* authorizes removal of "*[a]ny* covered class action

. . . *involving* a covered security, as set forth in subsection (b)." 15 U.S.C. § 77p(c) (emphases added). As signaled by their made-up "if and only if" condition, petitioners want to read the "as set forth" clause in isolation; but this construction simply ignores the modifiers "any" and "involving," which Congress actually used in the statute. Unlike petitioners, however, this Court "follow[s] the cardinal rule that a statute is to be read as a whole, since the meaning of statutory language, plain or not, depends on context." *King* v. *St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991) (citation omitted).

In addition to the terms "any" and "involving," petitioners' construction would render the entire final clause of the removal provision—removed actions "shall be subject to subsection (b)"—mere surplusage, in violation of the "cardinal principle of statutory construction" that "no clause, sentence, or word shall be superfluous, void, or insignificant." *Alaska Dep't of Envtl. Conservation* v. *EPA*, 540 U.S. 461, 489 n.13 (2004) (internal quotation omitted). Petitioners provide mute confirmation of this by omitting all reference to that clause from the argument section of their brief.

Petitioners seek solace in the legislative history, which states that actions "described in subsection (b)" are removable. Pet. Br. 32. They have no explanation, however, for the statement in the same passage that upon removal such actions "*may* be dismissed pursuant to the provisions of subsection (b)" (*ibid.* (emphasis added)); as explained above, this can only be read to mean that *some* actions that are removable are *not* precluded.[7]

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[7] Petitioners cite a statement prepared for the Chairman of the Securities and Exchange Commission opining that the removal and preemption provisions are "coextensive." Pet. Br. 32. The same statement goes on to explain, however, that the removal provision "allows a state fraud class action to be removed to federal court . . . so that a federal court could decide whether the state court claims are preempted." *Securities Litigation Abuses: Hearing Before the Subcomm. on Secs., Comm. on Banking,*

[Footnote continued on next page]

Petitioners' final argument is that "[i]f Congress had intended to authorize the removal of all 'covered class actions,' it would simply have enacted a statute providing that 'any covered class action brought in any State court involving a covered security shall be removable.'" Pet. Br. 37. Of course, if Congress had "chose[n] to permit removal *only* for those covered class actions that also meet the preemption requirements in subsection (b)," as petitioners contend (*ibid.*), Congress *could* have passed a statute saying that "any class action that is preempted under subsection (b) shall be removable." It did neither of these things, leaving this Court with the task of determining which reading is better: Petitioners', which is predicated upon one phrase read in isolation, or the Seventh Circuit's, which harmonizes the statute as a whole.

In this regard, it is telling that petitioners do not even attempt to maintain that the purpose of SLUSA would be advanced by limiting the scope of the removal provision to actions that are actually precluded. *See Romero* v. *International Term. Oper. Co.*, 358 U.S. 354, 379 (1959) (a jurisdictional statute should be construed in light "of the history that produced it, the demands of reason and coherence, and the dictates of sound judicial policy"). SLUSA is just one of several statutes that authorize removal on the basis of a federal defense; this Court's construction of similar statutes lays to rest any doubt that SLUSA's removal provision is broader than the preclusion provision—that is, that some cases are removable under but not precluded by SLUSA.

[Footnote continued from previous page]

Housing & Urban Affairs, 1997 WL 687807, at *26. In any event, this Court has traditionally "decline[d] to accord any significance" to statements that are not made by a Member of Congress or included in the Committee or Conference Reports. *Kelly* v. *Robinson*, 479 U.S. 36, 51 n.13 (1986).

b. A Colorable Defense Of SLUSA Preclusion Is Sufficient To Confer Removal Jurisdiction

When Congress has allowed removal on the basis of a federal defense, this Court has consistently held that the removing defendants must establish only a "colorable" (non-frivolous) federal defense; they do not have to go further and *prove* the defense in order to remove. Congress enacted SLUSA against this backdrop, and thus is presumed to have intended a similar construction of SLUSA's removal provision. *Davis* v. *Michigan Dep't of Treasury*, 489 U.S. 803, 813 (1989) ("When Congress codifies a judicially defined concept, it is presumed, absent an express statement to the contrary, that Congress intended to adopt the interpretation placed on that concept by the courts"); *cf. Dabit*, slip op. 13. Because SLUSA's removal provision is broader than the preclusion provision, some actions are removable but not precluded; such actions include those in which the removing defendant presents a colorable defense of preclusion, *even if* that defense is later rejected on the merits. The Court's precedents establish that the federal courts have subject-matter jurisdiction to hear such actions.

1. Under the federal officer removal statute (28 U.S.C. § 1442), "suits against federal officers may be removed despite the nonfederal cast of the complaint; the federal-question element is met if the defense depends on federal law." *Acker*, 527 U.S. at 431. In order to remove, a federal officer must establish that a "colorable" federal defense could be interposed to the action. *Mesa*, 489 U.S. at 139.

This Court has "rejected a 'narrow, grudging interpretation' of the statute, recognizing that 'one of the most important reasons for removal is to have the validity of the defense of official immunity tried in a federal court.'" *Acker*, 527 U.S. at 431 (quoting *Willingham*, 395 U.S. at 407). The Court "therefore do[es] not require the officer virtually to win his case before he can have it removed." *Ibid.* (internal quotation omitted). In *Acker*, the removing defendants "*ar-*

gued" a particular defense; the Court held that "that argument, *although we ultimately reject it*, . . . presents a colorable federal defense." *Ibid.* (emphases added); *see also id.* at 448 (Scalia, J., concurring in part and dissenting in part) (agreeing that "their federal defense is colorable"). Removal jurisdiction thus rested on the defensive *argument* advanced by the removing defendants, regardless of its ultimate correctness. Moreover, the *Acker* Court "credit[ed] the [removing defendants'] theory of the case for purposes . . . of our jurisdictional inquiry." *Id.* at 432.

Acker thus stands for two important propositions, both of which are fatal to petitioners' theory of this case. *First*, the removing defendant need only present a colorable argument that the elements of a federal defense have been satisfied to establish removal jurisdiction, even if that argument is later rejected on the merits. 527 U.S. at 431-32. *Second*, where Congress authorizes removal on the basis of a federal defense, the federal courts will accept the removing defendants' theory of the case in determining whether the defense is colorable. *Id.* at 432-33.[8]

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[8] Both propositions are fully consonant with the Court's treatment of jurisdictional grants for causes of action "brought under" a federal statute. "It is firmly established in [this Court's] cases that the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction, *i.e.*, the courts' statutory or constitutional *power* to adjudicate the case." *Steel Co.*, 523 U.S. at 89 (citing 5A Wright & Miller, *Federal Practice & Procedure* § 1350 at 196 n.8 (2d ed. 1990)). "[T]he district court has jurisdiction if 'the right of the petitioners to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another,'" and "[d]ismissal for lack of subject-matter jurisdiction because of the inadequacy of the federal claim is proper only when the claim is 'so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy.'" *Ibid.* (quoting *Bell*, 327 U.S. at 682-83, 685, and *Oneida Indian Nation* v. *County of Oneida*, 414 U.S. 661, 666 (1974)).

2. Petitioners relegate *Acker* to a single footnote in their merits brief, in which they proffer three grounds of ostensible distinction. Pet. Br. 38 n.45. Each is unavailing.

First, petitioners say that the federal officer statute "upholds important federal sovereignty interests," particularly "the statutory purpose 'to have the validity of the defense of official immunity tried in a federal court,'" that "are not present in SLUSA." Pet. Br. 38 n.45 (quoting *Acker*, 527 U.S. at 431). But "[t]he magnitude of the federal interest in protecting the integrity and efficient operation of the market for nationally traded securities cannot be overstated." *Dabit*, slip op. 5; *see* S. Rep. No. 182, *supra*, at 5. And the *sole* purpose of SLUSA's removal provision is to have the preclusion defense—which affords securities defendants with federal immunity from state-law class actions—decided by a federal court. *See* H.R. Rep. No. 640, *supra*, at 16. Congress thus expressed an unmistakable preference for a federal forum for determining the viability of the SLUSA-preclusion defense. *Cf. El Paso Natural Gas Co.* v. *Neztsosie*, 526 U.S. 473, 484-85 (1999).

Petitioners also say that whereas "[t]he Court has interpreted [the federal officer removal statute] not to require the removing officer to prove a 'clearly sustainable defense' but only a 'colorable defense,' SLUSA "expressly bases removability on whether there is preemption *in fact*—not merely on whether that defense is colorable." Pet. Br. 38 n.45 (quoting *Acker*, 527 U.S. at 432). But SLUSA no more contains such an "express" requirement than does the federal officer statute. In fact, to prevail on an official immunity defense, an officer must prove that he is being sued for acting under color of office (*Barr* v. *Matteo*, 360 U.S. 564, 572 (1959)), and to remove he must "establish that the suit is '*for* a[n] act under color of office.'" *Acker*, 527 U.S. at 431 (quoting 28 U.S.C. § 1442(a)(3)). The removal statute thus "cross-references" one of the substantive elements of the defense in much the same way that SLUSA does, but this Court has held that "demanding an airtight case on the merits" of this element would "defeat the purpose of the removal statute."

Id. at 432; *see also id.* at 448 (Scalia, J., dissenting) (removing officer need *not* "prove that the act prompting suit is, beyond doubt, an official one").

Finally, petitioners say that "[i]n every case removed under SLUSA, a federal court determines the 'validity' of the argument that the claims are preempted; that determination dictates whether the case was properly removed and subject to dismissal or improperly removed and subject to remand." Pet. Br. 38 n.45. But this Court has held in analogous circumstances that the "validity" of a federal defense "has no connection whatever with the question of jurisdiction." *Mesa*, 489 U.S. at 129 (internal quotations omitted). For this reason, petitioners err in relying (Pet. Br. 36) on the proposition that "a federal court always has jurisdiction to determine its own jurisdiction" (*United States* v. *Ruiz*, 536 U.S. 622, 628 (2002)); to establish removal jurisdiction, the Court has "only required [the removing defendants] to allege a colorable defense under federal law." *Mesa*, 489 U.S. at 129; *see Willingham*, 395 U.S. at 407. The *availability* of the defense is jurisdictional; its *success* is not. Petitioners have identified no reason to apply the opposite construction to SLUSA.

c. Respondents Asserted A Colorable Defense Of SLUSA Preclusion

A federal court has subject-matter jurisdiction if the removing defendant asserts a colorable (non-frivolous) federal defense on its theory of the case; if that defense is rejected, the decision is not jurisdictional, but on the merits. *Fauntleroy* v. *Lum*, 210 U.S. 230, 234-35 (1908); *see also Hartford Fire Ins. Co.* v. *California*, 509 U.S. 764, 812-13 (1993) (Scalia, J., dissenting). And where a case is removable on the basis of a federal defense, the courts look to the removal papers to establish the bases for federal jurisdiction. *Acker*, 527 U.S. at 432-33; *see also Franchise Tax Bd.* v. *Construction Lab. Vac. Trust*, 463 U.S. 1, 11 n.9 (1983) (where well-pleaded complaint rule is inapplicable, "the defendant's petition for removal could furnish the necessary guarantee that the case necessarily presented a substantial

question of federal law") (citing *Railroad Co.* v. *Mississippi*, 102 U.S. 135, 140 (1880), and *Gold-Washing & Water Co.* v. *Keyes*, 96 U.S. 199, 203-04 (1878)). Such a case can be dismissed or remanded for want of subject-matter jurisdiction only where the district court finds the defense, on the removing defendants' theory, to be frivolous and thus "not colorable." *Cf. Arbaugh*, slip op. 12 n.10; *Levering & Garrigues Co.* v. *Morrin*, 289 U.S. 103, 105 (1933).[9]

It is beyond reasonable dispute that the SLUSA preclusion defense advanced by respondents in this case was "colorable"; indeed, petitioners *conceded* every element of the defense save one, and this Court has since resolved that one in favor of respondents. The district court therefore had subject-matter jurisdiction at the time of removal. Its subsequent rejection of the preclusion defense was not a determination that the court lacked *power* to decide the parties' dispute, but rather an erroneous resolution of that dispute on the merits in favor of petitioners.

1. The only disputed merits issue in the lower courts was whether SLUSA's "in connection with" requirement limits the statute's preclusive reach to actions brought by purchasers and sellers of securities. Because respondents stood to "win" (by securing dismissal) under one construction of SLUSA, and to "lose" (by failing to establish the preclusion defense) on the other, the district court had federal jurisdiction to construe the statute. *Steel Co.*, 523 U.S. at 89; *see Willingham*, 395 U.S. at 409 ("[The removing defendants] sufficiently put in issue the questions of official justi-

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[9] For example, because SLUSA provides that a removable action must be brought "on behalf of more than 50 persons" (15 U.S.C. § 77p(f)(2)(A)), "[a] conclusion that a suit is not a 'covered class action' (say, because just 40 investors stand to recover damages) would imply that removal had been improper, and such a decision would come within § 1447(d)." Pet. App. 14a. Contrary to petitioners' contention (Pet. Br. 38), there is no "interna[l] inconsisten[cy]" in the decision below.

fication and immunity; the validity of their defenses should be determined in the federal courts"). The district court made no finding that respondents' position on the "in connection with" issue was "frivolous or immaterial," as would have been required to reject it on jurisdictional grounds. *Steel Co.*, 523 U.S. at 89. Nor could the district court have made such a finding, because respondents' position was well-founded on extant decisions of this Court—particularly *SEC* v. *Zandford*, 535 U.S. 813 (2002), and *United States* v. *O'Hagan*, 521 U.S. 642 (1997)—and this Court recently, and unanimously, *agreed* with respondents' position on the merits. *Dabit*, slip op. 16 ("For purposes of SLUSA preemption, . . . the identity of the plaintiffs does not determine whether the complaint alleges fraud 'in connection with the purchase or sale' of securities") (citing *Zandford* and *O'Hagan*).[10] The district court's erroneous resolution of this issue therefore did *not* result in a remand for lack of subject-matter jurisdiction.

2. In their merits brief in this Court, petitioners argue for the first time that their actions are not precluded by SLUSA because they "do not depend on allegations of fraud or manipulation." Pet. Br. 42. Petitioners not only failed to make this argument in the court below but, as the Seventh Circuit noted, they affirmatively repudiated it at oral argument. Pet. App. 6a ("they did not argue in their briefs—and did not maintain at oral argument despite the court's invitation—that their suits allege mismanagement rather than deceit or ma-

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[10] Under *Dabit*, the Seventh Circuit's resolution of this case on the merits—*i.e.*, that petitioners' "claims . . . are blocked by SLUSA" (Pet. App. 9a)—is clearly correct. And because *Dabit* is binding on both federal and state courts, petitioners' actions must be dismissed regardless of the correctness of the Seventh Circuit's acceptance of appellate jurisdiction. Accordingly, the Court could affirm the judgment below without resolving the jurisdictional issue. *Norton* v. *Mathews*, 427 U.S. 524, 530-31 (1976); *see Steel Co.*, 523 U.S. at 98 (explaining *Norton*).

nipulation"); *hear* http://www.ca7.uscourts.gov/fdocs/docs.fwx?caseno=04-1495&submit=showdkt&yr=04&num=1495 (audiofile of Seventh Circuit argument). While petitioners now dispute this concession (Pet. Br. 44), it is not before the Court because they did not seek, and the Court did not grant, certiorari on this issue. *Izumi Seimitsu Kogyo Kabushiki Kaisha* v. *U.S. Philips Corp.*, 510 U.S. 27, 31 n.5 (1993).

Undaunted by their express waiver to the Seventh Circuit, petitioners now assert that the characterization of their complaints is a matter of "subject-matter jurisdiction" that can "'never be forfeited or waived.'" Pet. Br. 44 (quoting *United States* v. *Cotton*, 535 U.S. 625, 630 (2002)). The Court recently confronted an analogous issue in *Arbaugh*, where a party who failed to contest a statutory element tried to put it in issue later by calling it jurisdictional. This Court disagreed on the ground that "[n]othing in the text of [the relevant statute] indicates that Congress intended courts, on their own motion, to assure that the [late-disputed] requirement is met." Slip op. 12. So, too, here: Nothing in the text of SLUSA indicates that Congress expected the district courts to independently analyze the elements of a preclusion defense that the party resisting removal failed or neglected to put in dispute. To the contrary, the *Dabit* Court undertook no such independent analysis, noting only that the plaintiff in that case "d[id] not dispute . . . that the complaint alleges misrepresentations and omissions of material facts." Slip op. 11. This is an element of the preclusion defense that *can* be waived, as the plaintiff did in *Dabit* and petitioners did in this case; it therefore is non-jurisdictional.[11]

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[11] In any event, petitioners are flatly wrong to assert that their complaints do not allege false statements or omissions, or manipulative or deceptive devices, under SLUSA. *See* Resp. C.A. Br. 12 n.4. As respondents explained in their removal papers (*see, e.g.*, J.A. 348-50 (*Kircher*)), this is made clear by the complaints themselves. *See* J.A. 169, 174-77 (*Potter*); 192, 197-200 (*Kircher*); 218, 223-25 (*Parthasarthy*); 244, 249-

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d. Because It Had Removal Jurisdiction, The District Court's Remand Orders Were Discretionary

The foregoing discussion establishes (a) that SLUSA's removal provision is broader than its preclusion provision, such that some actions are within the removal jurisdiction even though they are not precluded on the merits; (b) that such actions include those in which the removing defendants raise a colorable defense of preclusion; and (c) that respondents in this case advanced a colorable defense of SLUSA preclusion, thus investing the district court with jurisdiction at the time of removal. Because the district court made no finding that the federal question asserted by respondents was frivolous or insubstantial, it necessarily follows that the district court retained jurisdiction even after rejecting the preclusion defense on the merits. Accordingly, the remand orders were *not* based on a want of subject-matter jurisdiction; rather, the decision to remand in these circumstances is discretionary, and appellate review of such a remand order is not barred by § 1447(d) under *Thermtron*.

1. In light of the federal interest in regulating securities (*Dabit*, slip op. 5), there can be no doubt that Congress has the *power* to invest the federal courts with jurisdiction to hear all cases presenting a substantial federal question of SLUSA preclusion. *Verlinden*, 461 U.S. at 492 ("Congress may con-

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52 (*Dudley I*); 262, 267-70 (*Dudley II*); 279, 284-87 (*Vogeler*); 296, 301-03 (*Jackson*); 312, 316-18 (*Spurgeon*). Indeed, in their motions to remand, petitioners argued that SLUSA does not preclude claims brought by "current holders who are *fraudulently lulled* into continuing to hold" securities. J.A. 47 (Dkt. 20), at 7 (*Kircher*) (emphasis added). In *Dabit*, the complaint similarly "alleged that brokers were fraudulently induced . . . to retain or delay selling their securities." Slip op. 4. The Court's recognition that such a claim "unquestionably qualifies" for SLUSA preclusion (*id.* at 16) should be dispositive here.

fer on the federal courts jurisdiction over any case or controversy that might call for the application of federal law"); *see Osborn* v. *Bank of United States*, 22 U.S. (9 Wheat.) 738, 822 (1824). Nor is there any question but that Congress did so by enacting SLUSA. *Dudek* v. *Prudential Secs., Inc.*, 295 F.3d 875, 879 n.3 (8th Cir. 2002) ("The express removal provisions of SLUSA are clearly sufficient to confer Article III 'arising under' jurisdiction"); *see also Greenwood* v. *Peacock*, 384 U.S. 808, 833 (1966).[12]

Because a federal court has subject-matter jurisdiction over an action removed under SLUSA that presents a colorable claim of preclusion, it necessarily follows that the court retains jurisdiction even after concluding, on the merits, that the defense is inapplicable. *See Verlinden*, 461 U.S. at 493 (1983) ("a suit" that "necessarily raises questions of substantive federal law at the very outset . . . clearly 'arises under' federal law, as that term is used in Art. III"). A plurality of this Court has applied *Verlinden* to conclude in analogous

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[12] Instead of authorizing *removal* of a covered class action involving the things set forth in subsection (b), Congress could have authorized the defendant in such an action to seek a declaratory judgment in federal court that the action is precluded by federal law. Such a declaratory relief action would ordinarily be barred by the well-pleaded complaint rule (*Skelly Oil Co.* v. *Phillips Petroleum Co.*, 339 U.S. 667, 671-72 (1950)), but Congress can waive that aspect of the rule (*Franchise Tax Board*, 463 U.S. at 18 n.17)—as, indeed, it did with respect to removals in SLUSA. *Cf. Mesa*, 489 U.S. at 136 (removal statute "serves to overcome the 'well-pleaded complaint' rule which would otherwise preclude removal even if a federal defense were alleged"). So long as the allegations are colorable (non-frivolous), the federal court would have *jurisdiction* over the declaratory relief action regardless of whether each element of preclusion was met, just as a court has jurisdiction to hear a Title VII case even if the plaintiff does not ultimately win. And, as in the Title VII case, if the court ultimately rejects the federal question (the claim in *Arbaugh*, the defense under SLUSA), "then dismissal of the case would be on the merits, not for want of jurisdiction." *Bell*, 327 U.S. at 682.

circumstances that "a nonfrivolous federal question . . . when the case was removed to federal court" is sufficient to confer subject-matter jurisdiction over the entire case even where the court decides the federal question against the removing party. *Gutierrez de Martinez*, 515 U.S. at 435 (opinion of Ginsburg, J.); *see also, e.g.*, *Jamison* v. *Wiley*, 14 F.3d 222, 239 (4th Cir. 1994) ("That the federal court ultimately rejects the federal defense that supported removal . . . does not mean that it thereby loses subject matter jurisdiction over the removed action").

This Court has held that the district courts have discretionary authority to remand state-law actions to state court *even if* the federal court would have jurisdiction to see the case through to its end. *Cohill*, 484 U.S. at 354-55 ("when a court has discretionary jurisdiction over a removed state-law claim and the court chooses not to exercise its jurisdiction, remand is an appropriate alternative"). *Cohill* involved a case that originally asserted both federal and state claims; once the federal claims were dismissed, the district court retained pendent jurisdiction over the state claims, but decided to remand them. This Court expressly approved that procedure. *Ibid.*; *see also* 28 U.S.C. § 1367(c).

This case is analytically indistinguishable from *Cohill*: Because jurisdiction is determined at the time of removal (*St. Paul Mercury Indem. Co.* v. *Red Cab Co.*, 303 U.S. 283, 293 (1938)), the district court *had* subject-matter jurisdiction over a federal defense (under SLUSA) and related state claims; once the federal defense was rejected on the merits, the court retained jurisdiction to decide the state-law claims. *See* 14C Wright & Miller, *Federal Practice & Procedure* § 3739 at 435 (3d ed. 1998) ("the subject matter jurisdiction of a federal court over a properly removed action will not be defeated by later developments in the suit"). This Court has recognized, however, that "district courts do not overstep Article III limits when they decline jurisdiction of state-law claims on discretionary grounds . . . ." *Ruhrgas*, 526 U.S. at 585. Thus, the district court had the *power* to remand this

case to state court after rejecting the preclusion defense on the merits, even though it had jurisdiction to retain the case.

Construing SLUSA as authorizing a *Cohill*-type discretionary remand in these circumstances is entirely consistent with the statutory language: Congress specified that certain kinds of actions removed under SLUSA (*i.e.*, those that Congress expressly exempted from preclusion) "*shall* be remanded," but was silent on what a court is to do in other circumstances (such as when it ultimately rejects a colorable defense of preclusion in a non-exempt case).[13] The natural inference from its use of "shall" in specified instances is that Congress intended that other actions "*may* be remanded." *Martin* v. *Franklin Capital Corp.*, 126 S. Ct. 704, 709 (2005).

2. "[V]arious Courts of Appeals have relied on *Thermtron* to hold that § 1447(d) bars appellate review of § 1447(c) remands but not remands ordered under *Cohill*." *Things Remembered*, 516 U.S. at 130 (Kennedy, J., concurring) (citing cases); *see also, e.g.*, *Trans Penn Wax Corp.* v. *McCandless*, 50 F.3d 217, 224 (3d Cir. 1995) (holding that § 1447(d) does not bar review of a discretionary decision not to exercise jurisdiction over pendent state claims and noting that "[a]t least

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[13] SLUSA states that "if the Federal court determines that the action may be maintained in State court pursuant to *this subsection*, the Federal court shall remand such action to such State court." 15 U.S.C. §§ 77p(d)(4), 78bb(f)(3)(D) (emphasis added). As petitioners point out (Pet. Br. 39), in the context of the 1933 Act "this subsection" means subsection (d), which describes certain actions specifically exempted from SLUSA preclusion; thus, the mandatory remand provision does not by its terms apply to other actions, such as this case. In the 1934 Act, however, "this subsection" picks up all of subsection (f), which would include not only the express exemptions but the rest of SLUSA as well; that is how the court of appeals read it. Pet. App. 12a-13a. The statutory history shows that the "this subsection" language was adopted in the context of the 1933 Act, and then transposed to the 1934 Act. H.R. Rep. No. 640, *supra*, at 18. Thus, the mandatory remand provision is inapplicable here.

eight other circuit courts have agreed"). The reasoning of those cases is undoubtedly correct: A district court's discretionary decision to remand a case over which it could retain jurisdiction is, by definition, not based on lack of subject-matter jurisdiction within the meaning of § 1447(c).

Shortly after *Things Remembered*, this Court unanimously confirmed that § 1447(d) does not preclude appellate review of a discretionary remand order entered by a district court invested with subject-matter jurisdiction. *Quackenbush*, 517 U.S. at 712. There, the district court had diversity jurisdiction, but abstained under *Burford* v. *Sun Oil Co.*, 319 U.S. 315 (1943), and on that basis "remanded the entire case to state court." 517 U.S. at 710. This Court held

> that § 1447(d) interposes no bar to appellate review of the remand order at issue in this case. As we held in [*Thermtron*], and reiterated this Term in [*Things Remembered*], § 1447(d) must be read *in pari materia* with § 1447(c), so that only remands based on grounds specified in § 1447(c) are immune from review under § 1447(d). This gloss renders § 1447(d) inapplicable here: The District Court's abstention-based remand order does not fall into either category of remand order described in § 1447(c), as it is not based on lack of subject matter jurisdiction or defects in removal procedure.

Id. at 711-12 (citations and internal quotations omitted).

The remand orders entered by the district court in this case, like the order in *Quackenbush*, are appealable under *Thermtron*. There were no defects in removal procedure, and the district court's ultimate rejection of the SLUSA preclusion defense was a decision on the merits, not a jurisdictional determination. The court had removal jurisdiction by virtue of the colorable federal defense stated in respondents' removal papers (*Acker*, 527 U.S. at 431); its decision not to retain that jurisdiction after deciding the substantial federal question was both permissible (*Cohill*, 484 U.S. at 357) and appealable (*Quackenbush*, 517 U.S. at 712). As the Seventh

Circuit correctly concluded: "This suit was properly removed. The district judge made a substantive decision under authority granted by a federal statute. It follows that the remand is unaffected by § 1447(d)." Pet. App. 15a. That conclusion should be affirmed.

B. Affirmance Would Further The Objectives Of SLUSA Without Undermining The Policy Of § 1447(d)

1. The "ungainly acronym SLUSA" (Pet. App. 11a) stands for the Securities Litigation *Uniform* Standards Act. Congress sought greater uniformity in private securities litigation by generally precluding state-law class actions alleging securities fraud, requiring securities suits to proceed (if at all) in federal court under federal law. *Dabit*, slip op. 9-10, 15; *see* H.R. Conf. Rep. No. 803, *supra*, at 13 (SLUSA "makes Federal court the exclusive venue for most securities class action lawsuits" and "establishes uniform national rules for securities class action litigation involving our national capital markets").

It is not difficult to ascertain whether affirmance or reversal of the decision below would better serve Congress's expressed interest in uniformity in private securities litigation. Petitioners' proposal would mean that SLUSA would be independently construed in each judicial district, with no review by the courts of appeals or this Court in the event of a remand. This would only serve to perpetuate uncertainty, confusion, and disarray concerning the correct implementation of SLUSA. The Seventh Circuit's approach, by contrast, means that the inevitably varying district court decisions on an important federal defense are subject to review in the regional circuits, with any resulting conflicts subject to resolution by this Court. *See* Pet. App. 15a ("Appellate review of decisions under [SLUSA] will promote accurate and consistent enforcement of that statute, at little cost in delay beyond what the authorized removal itself creates"). Whereas petitioners' interpretation would practically guarantee disuniformity, the approach adopted by the court below best helps

ensure that the uniform standards enacted by Congress actually remained uniform. *See Rowinski* v. *Salomon Smith Barney Inc.*, 398 F.3d 294, 299 (3d Cir. 2005) (Congress intended "a broad interpretation of SLUSA to ensure the uniform application of federal fraud standards").

Indeed, there really is no dispute that the policies underlying SLUSA favor affirmance of the decision below, as *amici curiae* supporting affirmance have ably demonstrated. Petitioners and their *amici* do not even attempt to argue otherwise: Their briefs are entirely silent on whether the decision below is consistent with the policies and goals underlying SLUSA.

2. Rather than addressing the policies *of SLUSA*, petitioners and their *amici* argue only that the decision below is contrary the policies *of § 1447(d)*. Pet. Br. 45-48; Public Citizen Br. 9-14. The *Thermtron* rule, however, has stood the test of time and proven to be workable in practice. Although petitioners' *amici* assert that "*Thermtron* does not give lower courts sufficient guidance about where to draw the line between what is appealable and what is not" (Public Citizen Br. 11), this assertion is belied by the fact that this Court has only once in the past three decades reversed a court of appeals for reviewing a remand order. *Gravitt*, 430 U.S. at 723. During that time, this Court has itself twice reviewed remand orders (in *Quackenbush*, 517 U.S. at 712, and *Cohill*, 484 U.S. at 347), and, in its most recent decision enforcing the § 1447(d) bar, the Court expressly endorsed the *Thermtron* rule. *Things Remembered*, 516 U.S. at 127. To the extent *amici*'s concern is not with *inconsistency*, but with the fact that *Thermtron* "permit[s] appellate review of district court remand orders in a wide variety of circumstances" (Public Citizen Br. 10-11), that is simply an attack on *Thermtron* itself that cannot be reconciled with this Court's subse-

quent reaffirmation and implementation of the *Thermtron* rule in *Things Remembered* and *Quackenbush*.[14]

Petitioners recite the commonplace that Congress has the power to preclude judicial review of particular cases. Pet. Br. 46. But where Congress wishes to preclude appellate review of orders that would be reviewable under *Thermtron*, it well knows how. *See, e.g.*, 28 U.S.C. § 1452(b) (authorizing remand of certain bankruptcy cases on grounds not specified in § 1447(c), and expressly providing that such a remand "is not reviewable by appeal or otherwise by the court of appeals"). Congress's decision not to enact a similar limitation in SLUSA necessarily means that it expected the *Thermtron* rule to apply.

Petitioners next contend that "Congress did not vest the federal judiciary with exclusive power to interpret and apply SLUSA's preemption provision." Pet. Br. 47. This is mere semantics; Congress *did* vest the federal judiciary with the exclusive power to decide SLUSA preclusion *at the defendant's election*. Some defendants, for tactical or strategic reasons, might choose not to remove a covered class action, in which case the defense of SLUSA preclusion could be available in state court; but such cases will be relatively rare, and for the vast majority of cases Congress did make federal court the exclusive forum for deciding SLUSA preclusion

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[14] Petitioners accept *Thermtron* as settled law, and do not question the distinction drawn in *Thermtron* between § 1447(c)-based remand orders and all other remand orders. Pet. Br. 20-21. For this reason alone, the Court should reject the thinly veiled request of petitioners' *amici* to reconsider or abandon the *Thermtron* rule. *See, e.g., UPS, Inc.* v. *Mitchell*, 451 U.S. 56, 60 n.2 (1981). In any event, "Congress has had almost 30 years in which it could have corrected [the Court's] decision in [*Thermtron*] if it disagreed with it, and has not chosen to do so." *Hilton* v. *South Carolina Pub. Rys. Comm'n*, 502 U.S. 197, 202 (1991). In light of the "special force" that *stare decisis* carries in the statutory arena (*ibid.*), the Court should continue to adhere to the construction afforded § 1447(d) in *Thermtron*.

issues. Pet. App. 15a ("SLUSA ensures that only the federal judiciary makes the [preclusion] decision"). It did so to advance the goal of uniformity that underlies SLUSA—a goal that would be furthered by affirming the decision below.

Petitioners assert that "the absence from SLUSA of a provision authorizing appellate review of remand orders reflects Congress's decision not to saddle plaintiffs who already have suffered delay through removal with the additional delay and costs associated with appeal." Pet. Br. 47. To the contrary, *Quackenbush* and *Things Remembered* had reaffirmed the *Thermtron* rule less than two years before SLUSA was enacted; Congress is thus deemed to have adopted this long-standing construction of § 1447(d). *See, e.g., Midlantic Nat'l Bank* v. *New Jersey Dep't of Envtl. Prot.*, 474 U.S. 494, 501 (1986). Because remands based on a district court's rejection of a colorable SLUSA preclusion defense do not fall within either of the § 1447(c) categories, Congress had no need to create an express exception to § 1447(d) to permit review of such remands.[15]

In any event, petitioners' purported concern with "delay" is misplaced: Section 1447(d) is designed "to prevent delay in the trial of remanded cases by protracted litigation of *jurisdictional issues*." *Thermtron*, 423 U.S. at 351 (emphasis added). Since the question of SLUSA preclusion is not jurisdictional, this concern is not implicated. The issue here is not whether petitioners' claims are decided in federal or state court, but whether federal law permits them to be heard at all.

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[15] By contrast, Congress clearly *did* need to legislate an express exception to § 1447(d) to permit appellate review of remand orders under CAFA, which amends 28 U.S.C. § 1332 to grant district courts jurisdiction over certain class actions based on minimal diversity (*see* 28 U.S.C. § 1332(d)(2)); a remand based on a district court's conclusion that the jurisdictional requirements set forth in § 1332 (as so amended) have not been met clearly falls within the ambit of § 1447(c). *See Gravitt*, 430 U.S. at 723.

Moreover, Congress has countenanced a certain amount of judicially supervised delay in securities litigation. The PSLRA, for example, provides for an automatic stay of discovery during the pendency of a motion to dismiss (15 U.S.C. §§ 77z-1(b)(1), 78u-4(b)(3)(B)), and SLUSA permits a federal court to stay discovery in state court proceedings when "necessary in aid of its jurisdiction, or to protect or effectuate its judgments, in an action subject to a stay of discovery" under the PSLRA (15 U.S.C. §§ 77z-1(b)(4), 78u-4(b)(3)(D)). And the courts of appeals have ample power to screen out frivolous or dilatory appeals, and to expedite meritorious appeals if warranted. *See Abney* v. *United States*, 431 U.S. 651, 662 n.8 (1977).

Petitioners' final argument is that "[b]y disregarding the limits on its jurisdiction prescribed by Congress in § 1447(d), the court of appeals impermissibly substituted its own judgment for that of Congress." Pet. Br. 47-48. But the court below neither "disregard[ed]" § 1447(d) nor recognized "a new implicit exception to § 1447(d)" (Public Citizen Br. 9); rather, it engaged in a straightforward application of the 30-year-old *Thermtron* rule. Continued adherence to that rule compels affirmance of the decision below.

II. The Seventh Circuit Also Had Appellate Jurisdiction Under *Waco*

In *Waco* v. *United States Fidelity & Guaranty Co.*, 293 U.S. 140 (1934), this Court held that the statutory bar on appeals of remand orders does not preclude review of an otherwise appealable decision made by a district court before it remands an action, if that decision will be "conclusive" upon a party in state court. 16 *Moore's Federal Practice* § 107.44[2][a] at 107-254.3 (3d ed. 2005) ("[E]ven if the issue is intrinsic to the district court's decision to remand, if the decision on that issue alters the contours of the remanded action, the decision is reviewable" under *Waco*). Rather, § 1447(d) only precludes review of the remand itself—*i.e.*, the denial of the defendant's asserted right to a federal forum. 293 U.S. at 143. Thus, even if the Court were to conclude

that the remands in this case were based on a lack of subject-matter jurisdiction, the Court would have to decide whether the court of appeals properly exercised appellate jurisdiction under *Waco* to review (and reverse) the district court's rejection of respondents' SLUSA defenses.

1. *Waco* began as a state-court action by a citizen of Texas against the City of Waco. The City by cross-action joined the Fidelity Company, a citizen of Maryland, and removed the entire case on the basis of diversity. The plaintiff argued that "the company was improperly joined under state law and such joinder could not give the federal court jurisdiction." *Id.* at 141-42. In a single decree, the district court dismissed the cross-action because the Fidelity Company "was an unnecessary and improper party," and, "since, upon that dismissal, there was no diversity of citizenship of the remaining parties, the court held it lacked jurisdiction, and remanded the cause to the state court." 293 U.S. at 142. The City appealed, arguing that the dismissal of the cross-action "was contrary to the law of Texas." *Ibid.* The court of appeals dismissed the appeal on the ground that "no appeal lies from an order of remand." *Ibid.*

The City argued before this Court that the unavailability of appellate review left it in an "anomalous position," because the "District Court's order will be treated as conclusive upon the question of the City's right to maintain its cross-action." 293 U.S. at 143. The Court agreed with the City, explaining that

> no appeal lies from the order of remand; but in logic and in fact the decree of dismissal preceded that of remand and was made by the District Court while it had control of the cause. Indisputably this order is the subject of an appeal; and, if not reversed or set aside, is conclusive upon the petitioner.

Id. at 143.

Waco is not so much an exception to § 1447(d) as a recognition of that statute's limited scope. Section 1447(d) is designed to "avoid[] interruption of the litigation of the mer-

its of removed causes." *United States* v. *Rice*, 327 U.S. 742, 752 (1946). It precludes review of a remand because "[t]he only thing that is at stake is the forum that will hear a claim. This is certainly not an unimportant matter, but it is not so fundamental that a second or third layer of judges must test its correctness." *Adkins* v. *Ill. Cent. R.R. Co.*, 326 F.3d 828, 832 (7th Cir. 2003). But *Waco* makes clear that where—as here—a district court's remand is preceded by a substantive decision that will alter the contours of the state-court action, the appealability of *that* decision is unaffected by § 1447(d).

2. Like the district court's decision dismissing the cross-action in *Waco*, the district court's decision that these actions are not precluded by SLUSA would have been conclusive in state court, leaving respondents in the "anomalous position" of having lost a total defense to liability without any opportunity to secure appellate review of the district court's decision. 293 U.S. at 143; *see* Pet. App. 15a ("it is now or never for appellate review of the question whether an action under state law is preempted" by SLUSA). That decision was appealable even *if* § 1447(d) technically barred review of the resultant decision remanding the actions to state court.

Upon removal, the district court was statutorily required to "subject" petitioners' actions to the preclusion provision of SLUSA (15 U.S.C. § 77p(c)), and necessarily decided the contested question whether the actions are, in fact and law, precluded. Accordingly, the issue of SLUSA preclusion was "actually litigated and determined" by the district court, and therefore would have precluded respondents from raising their SLUSA defense on remand. *C.I.R.* v. *Sunnen*, 333 U.S. 591, 598 (1948); *see Baldwin* v. *Iowa State Traveling Men's Ass'n*, 283 U.S. 522, 525-26 (1931).

The district court's ruling on the SLUSA preclusion defense is likewise plainly "the subject of an appeal." *Waco*, 293 U.S. at 143. Its decision "conclusively determine[d] the disputed question" of SLUSA preclusion; that question is one of great importance to respondents and is "completely separate" from the merits of the petitioners' claims under state

law; and the district court's decision not only will be "effectively unreviewable on appeal from a final judgment," but will be *actually* unreviewable. *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 11-12 (1983) (internal quotations omitted). Indeed, the denial of a SLUSA preclusion defense is likely immediately appealable under *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), even in a case initiated in federal court. *Cf. Will* v. *Hallock*, 126 S. Ct. 952, 959 (2006).

3. Although petitioners have elected not to address *Waco* in this Court, they did do so in the court of appeals.[16] Since they may resurrect these arguments for their reply brief, respondents offer some anticipatory rebuttals.

a. Petitioners argued below that this case is not within the *Waco* doctrine because the district court made "only" a jurisdictional ruling. In fact, the district court also had before it respondents' motions to dismiss petitioners' actions as precluded by SLUSA, which it simultaneously denied as "moot." But even if, *arguendo*, the district court's *remand* order was based on a want of subject-matter jurisdiction, a necessary predicate to that order was that petitioners' actions are *not* within the preclusive reach of SLUSA. On petitioners' reading of the statute, a case is removable only if it is precluded; a necessary corollary of that reading is that a case that is *not* removable is *not* precluded. The preclusion decision itself is not jurisdictional even if its consequences can be so described.

b. Petitioners also argued below that the district court's decision would not be "conclusive" in state court, staking out

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[16] Respondents relied on the *Waco* doctrine both before the court of appeals (*see, e.g.*, Juris. Memo. for the Janus Appellants (7th Cir. Mar. 16, 2004), at 7-10) and in their brief in opposition to the petition for a writ of certiorari (at 17 & n.7). This issue is therefore properly before the Court. *Schweiker* v. *Hogan*, 457 U.S. 569, 585 n.24 (1982). Nevertheless, petitioners chose not to address it in their merits brief.

several positions that are directly contrary to this Court's precedents.

First, petitioners argued that it is not the province of the federal courts to prejudge a state court's application of the collateral estoppel doctrine. But as this Court has explained, States cannot give federal judgments whatever preclusive "effect they would give their own judgments"; rather, they "must accord them the effect that this Court prescribes." *Semtek Int'l Inc.* v. *Lockheed Martin Corp.*, 531 U.S. 497, 507 (2001). This Court has prescribed that "where the judgment or decree of the federal court determines a right under a federal statute, that decision is 'final until reversed in an appellate court, or modified or set aside in the court of its rendition.'" *Stoll* v. *Gottlieb*, 305 U.S. 165, 170 (1938).

Second, petitioners suggested that a federal court's decision is not entitled to preclusive effect if made in the context of a jurisdictional inquiry. "This Court has long recognized," however, "that '[t]he principles of *res judicata* apply to questions of jurisdiction as well as to other issues'" (*Underwriters Nat'l Assur. Co.* v. *North Carolina Life & Accident & Health Ins. Guar. Ass'n*, 455 U.S. 691, 706-707 & n.13 (1982)), and has explicitly instructed that "[i]ssue preclusion in subsequent state-court litigation [after remand] . . . may . . . attend a federal court's subject-matter [jurisdiction] determination." *Ruhrgas*, 526 U.S. at 585; *see also Chicot County Drainage Dist.* v. *Baxter State Bank*, 308 U.S. 371, 376 (1940) ("[Federal court] determinations of [jurisdictional] questions, while open to direct review, may not be assailed collaterally").[17]

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[17] Nor does a statutory bar to appellate review vitiate the preclusive effect of a federal court's decision on matters of federal law. *See Johnson Co.* v. *Wharton*, 152 U.S. 252, 261 (1894) ("The existence or non-existence of a right, in either party, to have the judgment in the prior suit reexamined, upon appeal or writ of error, cannot, in any case, control"); *see also United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 38-39 (1950).

Third, petitioners argued that respondents could ultimately seek review in this Court upon the conclusion of the state court proceedings. This Court has held, however, that when a federal court remands a case, and the state court thereafter proceeds to final judgment, the action of the federal court is not reviewable on writ of error to such judgment. *Missouri Pac. Ry. Co.* v. *Fitzgerald*, 160 U.S. 556, 582-83 (1896). "A state court cannot be held to have decided against a Federal right when it is the [federal court], and not the state court, which has denied its possession." *Id.* at 582.; *accord*, *McLaughlin Bros.* v. *Hallowell*, 228 U.S. 278 (1913); *Yankaus* v. *Feltenstein*, 244 U.S. 127 (1917).

4. *Waco* does not swallow—or even affect—the rule that remand orders are not appealable, because review under *Waco* does not upset the district court's determination that the action must proceed, if at all, in state court. Section 1447(d)'s bar on continued litigation over choice of forum is thus fully respected, as *Waco* itself demonstrates. Although reversal of the dismissal of the cross-action would have demonstrated that the City indeed had the right to a federal forum, it would not serve to return the case to federal court. 293 U.S. 143-44 ("A reversal cannot affect the order of remand, but it will at least, if the dismissal of the petitioner's complaint was erroneous, remit the entire controversy, with the Fidelity Company still a party, to the state court for such further proceedings as may be in accordance with law").

Under *Waco*, the underlying actions here would be returned to state court pursuant to the remand orders; but the Seventh Circuit's determination that the actions are precluded by SLUSA—which has since been approved by this Court in *Dabit*—would be binding and the cases would be dismissed by the state courts. That is precisely what the state courts did here upon being notified of the federal decisions. *See* J.A. 5 (*Parthasarthy*); 11-12 (*Potter*); 28 (*Vogeler*). Accordingly, if the Court were to hold *Thermtron* and *Quackenbush* inapplicable to this case, the Seventh Circuit's acceptance of appellate jurisdiction could be affirmed on the alternative ground articulated in *Waco*. As a treatise co-authored

by one of petitioners' *amici* explains, "[t]he *City of Waco* rule is correct" because "the federal judicial system is built on the premise that district court rulings on the merits are appealable as a matter of right, and that the appeal should go to a federal court. Appeal upon completion of the federal proceedings is the only answer available in the present system." 15A Wright & Miller, *Federal Practice & Procedure* § 3914.11 at 712 (2d ed. 1992).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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Title 28 U.S.C. § 1291 provides, in pertinent part:

§ 1291. Final decisions of district courts

The courts of appeals * * * shall have jurisdiction of appeals from all final decisions of the district courts of the United States, * * * except where a direct review may be had in the Supreme Court. * * *

Title 28 U.S.C. § 1367 provides, in pertinent part:

§ 1367. Supplemental jurisdiction

(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. * * *

* * *

(c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if—

(1) the claim raises a novel or complex issue of State law,

(2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,

(3) the district court has dismissed all claims over which it has original jurisdiction, or

(4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

* * *

Title 28 U.S.C. § 1442 provides, in pertinent part:

§ 1442. Federal officers or agencies sued or prosecuted

(a) A civil action or criminal prosecution commenced in a State court against any of the following may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:

(1) The United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof, sued in an official or individual capacity for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

* * *

(3) Any officer of the courts of the United States, for any act under color of office or in the performance of his duties.

(4) Any officer of either House of Congress, for any act in the discharge of his official duty under an order of such House.

* * *

Title 28 U.S.C. § 1453 provides, in pertinent part:

§ 1453. Removal of class actions

* * *

(b) **In general.**—A class action may be removed to a district court of the United States in accordance with section 1446 (except that the 1-year limitation under section 1446(b) shall not apply), without regard to whether any defendant is a citizen of the State in which the action is brought, except that such

action may be removed by any defendant without the consent of all defendants.

(c) **Review of Remand Orders.**—

(1) **In General.**—Section 1447 shall apply to any removal of a case under this section, except that notwithstanding section 1447(d), a court of appeals may accept an appeal from an order of a district court granting or denying a motion to remand a class action to the State court from which it was removed if application is made to the court of appeals not less than 7 days after entry of the order.

* * *

(d) **Exception.**—This section shall not apply to any class action that solely involves—

(1) a claim concerning a covered security as defined under section 16(f)(3) of the Securities Act of 1933 (15 U.S.C. § 78p(f)(3)) and section 28(f)(5)(E) of the Securities Exchange Act of 1934 (15 U.S.C. § 78bb(f)(5)(E));

* * *

Title 18 U.S.C. § 3731 provides, in pertinent part:

§ 3731. Appeal by United States

In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information or granting a new trial after verdict or judgment, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.

* * *

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IN THE
Supreme Court of the United States

CARL KIRCHER, ET AL.,
Petitioners,
v.
PUTNAM FUNDS TRUST, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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April 14, 2006

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

ARGUMENT:

I. REMAND ORDERS FOR LACK OF SUBJECT-MATTER JURISDICTION UNDER SLUSA ARE NOT REVIEWABLE ON APPEAL 1

II. SLUSA MAKES REMOVAL JURISDICTION DEPENDENT ON PREEMPTION 7

III. *WACO* DOES NOT AUTHORIZE REVIEW 17

CONCLUSION 20

TABLE OF AUTHORITIES

Page

CASES

Aetna Health Inc. v. Davila, 542 U.S. 200 (2004).....14

Aliota v. Graham, 984 F.2d 1350 (3d Cir. 1993).....4

Arbaugh v. Y & H Corp., 126 S. Ct. 1235 (2006).....2, 3, 4, 8, 9

Beneficial Nat'l Bank v. Anderson, 539 U.S. 1 (2003).....14

Calderon v. Aerovias Nacionales de Columbia, 929 F.2d 599 (11th Cir. 1991).....19

California Pub. Employees' Retirement Sys. v. World-Com, Inc., 368 F.3d 86 (2d Cir. 2004), *cert. denied*, 543 U.S. 1080 (2005).....6

City of Waco v. United States Fid. & Guar. Co., 293 U.S. 140 (1934).....18, 19, 20

Dalrymple v. Great River Dam Auth., 145 F.3d 1180 (10th Cir. 1998).....6

Franchise Tax Bd. v. Construction Laborers Vacation Trust for Southern California, 463 U.S. 1 (1983).....14

Gravitt v. Southwestern Bell Tel. Co., 430 U.S. 723 (1977).....2, 3

INS v. National Ctr. for Immigrants' Rights, Inc., 502 U.S. 183 (1991).....10

King v. St. Vincent's Hosp., 502 U.S. 215 (1991).....9

Liberty Mut. Ins. Co. v. Wetzel, 424 U.S. 737 (1976) 4

Lyons v. Alaska Teamsters Employer Serv. Corp., 188 F.3d 1170 (9th Cir. 1999) 20

Martin v. Franklin Capital Corp., 126 S. Ct. 704 (2005) 11

Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit, 126 S. Ct. 1503 (2006) 7, 9, 14, 15, 16, 18, 20

Metropolitan Cas. Ins. Co. v. Stevens, 312 U.S. 563 (1941) 3, 18

Nashville, C. & St. L. Ry. v. Wallace, 288 U.S. 249 (1933) 4

Nutter v. Monongahela Power Co., 4 F.3d 319 (4th Cir. 1993) 19, 20

Powers v. Southland Corp., 4 F.3d 223 (3d Cir. 1993) 19

Rogers v. Tyson Foods, Inc., 308 F.3d 785 (7th Cir. 2002) 20

Scheidler v. National Organization for Women, Inc., 126 S. Ct. 1264 (2006) 10

Shook v. District of Columbia Fin. Responsibility & Mgmt. Assistance Auth., 132 F.3d 775 (D.C. Cir. 1998) 10

Soley v. First Nat'l Bank of Commerce, 923 F.2d 406 (5th Cir. 1991) 20

Standefer v. United States, 447 U.S. 10 (1980) 20

Thermtron Products, Inc. v. Hermansdorfer, 423 U.S. 336 (1976) 2, 3, 4, 6

Things Remembered, Inc. v. Petrarca, 516 U.S. 124 (1995) 4, 6

United States v. Martin Linen Supply Co., 430 U.S. 564 (1977) 5

United States v. Minker, 350 U.S. 179 (1956) 10

United States v. Price, 361 U.S. 304 (1960) 9

United States v. Rice, 327 U.S. 742 (1946) 6

United States v. Ruiz, 536 U.S. 622 (2002) 4-5

Webster v. Fall, 266 U.S. 507 (1925) 9

Willingham v. Morgan, 395 U.S. 402 (1969) 13, 14

CONSTITUTION, STATUTES, AND REGULATIONS

U.S. Const.:

Art. I, § 8, cl. 3 6

Art. III 4

Civil Rights Act of 1964, Tit. VII, 42 U.S.C. §§ 2000e *et seq.* 2, 8

Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 9

Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 14

Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 8

Securities Act of 1933, 15 U.S.C. §§ 77a *et seq.*:

15 U.S.C. § 77p(b) 1, 8, 10, 12, 13, 15

15 U.S.C. § 77p(c) 1, 3, 4, 7, 8, 9, 10, 11, 20

15 U.S.C. § 77p(d) 8, 12

15 U.S.C. § 77p(d)(4) 11, 12

Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, 112 Stat. 3227 ..... *passim*

§ 2(5), 112 Stat. 3227 7

18 U.S.C. § 3731 5

28 U.S.C. § 1447 2

28 U.S.C. § 1447(c) 4, 6

28 U.S.C. § 1447(d) 1, 2, 3, 4, 5, 6, 7, 13, 18

17 C.F.R. § 240.10b-5 (Rule 10b-5) 1, 6, 7, 10, 11, 15, 20

LEGISLATIVE MATERIALS

H.R. Conf. Rep. No. 105-803 (1998) 7

H.R. Rep. No. 105-640 (1998) 8, 11

S. Rep. No. 105-182 (1998) 11

OTHER MATERIALS

16 *Moore's Federal Practice* (3d ed. 2005) 19

15A Charles Alan Wright, *et al.*, *Federal Practice and Procedure* (2d ed. 1992) 20

For centuries, the general rule has been that orders remanding cases to state court are not reviewable on appeal. That rule governs when the remand is based on a lack of subject-matter jurisdiction. Without even a passing nod to the history of 28 U.S.C. § 1447(d), respondents attempt to extrapolate from this Court's narrow exceptions to the general rule of non-appealability a rule that gives defendants in securities cases a right to appellate review that other civil defendants do not enjoy. This Court should reject that plea. Although Congress knows how to draft a right of appellate review when it wants to, it did not do so in SLUSA. Rather, Congress made clear that 15 U.S.C. § 77p(c) – which concededly governs subject-matter jurisdiction – defines removal jurisdiction to be coextensive with SLUSA's preemptive scope. That reading advances Congress's multiple purposes of ensuring that Rule 10b-5 claims masquerading as state-law claims may be brought only in federal court and that non-preempted claims will proceed in state court without burdening the federal system with appeals of remand orders.

I. REMAND ORDERS FOR LACK OF SUBJECT-MATTER JURISDICTION UNDER SLUSA ARE NOT REVIEWABLE ON APPEAL

A. This case concerns the district courts' construction of SLUSA's removal provision, 15 U.S.C. § 77p(c), which respondents agree "confers subject-matter jurisdiction in the federal courts" over removed cases. Br. 19. The district courts below construed § 77p(c)'s phrase, "as set forth in subsection (b)," to mean that Congress intended to condition removal on a defendant's satisfaction of each element of the preemption defense set out in § 77p(b). Indeed, respondents' own notices of removal argued that removal was proper precisely because each of the § 77p(b) requirements for preemption was met. *See* Pet. Br. 33-34. After finding no preemption, the district courts expressly dismissed these actions for a "'lack[of] subject matter jurisdiction.'" Resp. Br. 12 (quoting Pet. App. 12a).

Respondents concede that the district courts explicitly based remand on a lack of subject-matter jurisdiction. *See*

id. Respondents' concession resolves this case. As the Court explained in *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1976), "[i]f a trial judge *purports* to remand a case on the ground that it was removed improvidently and without jurisdiction, his order is not subject to challenge in the court of appeals by appeal, by mandamus, or otherwise." *Id.* at 343 (emphasis added, quotation marks omitted). That prohibition on appellate review applies to *all* remands based on a district court's determination that it lacks subject-matter jurisdiction, whether "erroneous or not." *Id.* Given the district courts' express conclusions that they lacked subject-matter jurisdiction, the remand orders issued pursuant to those findings are unreviewable. *See Gravitt v. Southwestern Bell Tel. Co.*, 430 U.S. 723, 723-24 (1977) (per curiam).

Respondents attempt (at 13) to avoid *Thermtron*'s mandate by claiming that a court of appeals is not bound by the "label" the district court gives to its remand order. Citing *Arbaugh v. Y & H Corp.*, 126 S. Ct. 1235 (2006), respondents argue that a court of appeals may review a remand order to determine whether the district court's jurisdictional determination was correct. But *Arbaugh* did not construe or even cite § 1447. There, the district court had vacated a plaintiff's Title VII jury verdict for lack of jurisdiction on the ground, raised for the first time after trial, that the defendant employer had fewer than 15 employees. This Court reversed, finding that the employee-numerosity requirement in Title VII went to the merits and not jurisdiction and was therefore waived.

Under § 1447(d), by contrast, inquiring into the reasoning underlying a remand order based on lack of subject-matter jurisdiction is precisely what *Thermtron* proscribes: "remand orders issued under § 1447(c) and invoking the grounds specified therein – that removal was improvident and without jurisdiction – are immune from review under § 1447(d)." 423 U.S. at 346. In view of the district courts' express statements that they remanded for lack of subject-matter jurisdiction, those orders are unreviewable, even if the courts plainly erred in concluding

that jurisdiction was lacking. "[T]he issue of removability is closed if the federal district court refuses to assume jurisdiction and remands the cause." *Metropolitan Cas. Ins. Co. v. Stevens*, 312 U.S. 563, 568 (1941); *see* Pet. Br. 24-28.

B. In any event, respondents wrongly maintain that this case turns on a dispute about a "label." In *Arbaugh*, the employee-numerosity provision was not jurisdictional, whereas § 77p(c) concededly *is* jurisdictional. *See* Resp. Br. 19 ("SLUSA's removal provision . . . confers subject-matter jurisdiction"). Respondents' disagreement thus is not with the *label* attached to the district courts' rulings, but with those courts' *construction* of § 77p(c) as incorporating the preemption criteria "set forth in subsection (b)" for purposes of subject-matter jurisdiction. That fundamentally is a disagreement with the correctness of the district courts' jurisdictional analysis – both in statutory construction and in application of facts to law – under a statute that governs subject-matter jurisdiction.

Thus, even if respondents were correct that an order expressly based on a lack of jurisdiction could be reviewed if the court wrongly "labeled" the statutory provision as jurisdictional when in fact it was not – and *Thermtron* and its progeny reject that proposition – such a principle would not apply here. Respondents' argument would effectively limit the reach of § 1447(d) to issues of fact (*e.g.*, citizenship of a party), but would make reviewable alleged errors of law made by the district court in construing a jurisdictional statute. Respondents' position that *Thermtron*'s narrow exception is in fact a baseline "*Thermtron* rule" (Br. 9, 11, 38-41), to which § 1447(d) provides a limited exception, is squarely contrary to this Court's longstanding precedent and turns on its head Congress's policy that remand orders are not reviewable. *See* Pet. Br. 20-23 (detailing history of § 1447(d)); *id.* at 28 n.34.

Moreover, respondents' theory cannot be reconciled with *Gravitt*, which concerned a district court's application of judicial estoppel to bar the defendant's assertion that it was diverse from all plaintiffs. The court of appeals found the remand order reviewable because judicial estoppel is

not a ground mentioned in § 1447(c). This Court rejected that notion. It held that, because the remand was based on lack of diversity, it was unreviewable. *See* Pet. Br. 25-26. That is the same as the jurisdictional holding here, which was based on the district courts' conclusions that § 77p(c) incorporated the preemption factors "as set forth in subsection (b)," and that those factors were not met.[1]

C. Contrary to respondents' view, prohibiting appellate review of a remand order expressly based on a lack of subject-matter jurisdiction does not conflict with the doctrine that "federal courts must independently determine whether appellate jurisdiction exists in a given case." Resp. Br. 13. A court of appeals always has jurisdiction to determine its own power to review a remand order, that is, "to determine its own jurisdiction." *United States v.*

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[1] Respondents' additional cases are inapposite. *See* Br. 13. Like *Arbaugh*, two of the decisions cited from this Court neither addressed § 1447(d) nor concerned a remand to state court. *See Liberty Mut. Ins. Co. v. Wetzel*, 424 U.S. 737 (1976) (holding final judgment on liability that declined to award a remedy was non-final and unreviewable); *Nashville, C. & St. L. Ry. v. Wallace*, 288 U.S. 249 (1933) (state legislative judgments concerning declaratory actions not controlling as to whether an Article III "case or controversy" exists). Justice Ginsburg's statement concerning a "tag" in her concurring opinion in *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124 (1995), was made in the context of rejecting a law/equity distinction under a bankruptcy code statute, and had nothing to do with § 1447(d) orders. *See id.* at 134; *id.* at 135 ("A restrictive definition of what is 'equitable' could invite wasteful controversy over the reviewability of bankruptcy case remand orders *that are not reached by § 1447* and rest on grounds a common-law pleader might type 'legal.'") (emphasis added). The Third Circuit in *Aliota v. Graham*, 984 F.2d 1350 (3d Cir. 1993) (Alito, J.), did address § 1447(d), but not in a way that assists respondents. There, the court found that the district court had exceeded its authority in finding erroneous a determination made by the Attorney General, which by statute was deemed "conclusive" as to "subject matter jurisdiction" and therefore *unreviewable*. *Id.* at 1357 (analogizing to *Thermtron*'s holding that a district court lacks authority to remand based on an overcrowded docket, "'*grounds that he had no authority to consider*'") (quoting 423 U.S. at 351) (emphasis added in *Aliota*). Here, by contrast, there can be no dispute that the district courts were authorized – indeed, required – to construe § 77p(c)'s requirements for subject-matter jurisdiction over removed cases.

Ruiz, 536 U.S. 622, 628 (2002). When a district court bases remand on a lack of subject-matter jurisdiction, the court of appeals must conclude that it lacks jurisdiction to review that order, particularly when the district court is construing a subject-matter jurisdiction provision.

Respondents next attempt to analogize to decisions construing the bar on appellate review of judgments of acquittal in a criminal case in 18 U.S.C. § 3731. They note the Court's instruction that "'what constitutes an "acquittal" is not to be controlled by the form of the judge's action'"; instead, it depends on "'whether the ruling of the judge, whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged.'" Resp. Br. 14 (quoting *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977); citing other cases). Respondents view those cases as establishing that "a court of appeals may question a district court's labeling of its remand order as 'jurisdictional' without violating the bar on appeals of . . . jurisdictional remands." Br. 15; *see id.* (asserting that court should "independently determine the basis for a district court's remand order before holding that § 1447(d) bars an appeal").

Respondents' analogy is inapt. The purpose of the label rule in the acquittal cases is not to prevent delay suffered by plaintiffs in litigating removal issues on appeal and thereby to tolerate some risk of inaccuracy (as with § 1447(d)), but rather to achieve the fullest accuracy possible to protect a criminal defendant's right to avoid double jeopardy and thus to preclude the government from bringing a second criminal prosecution. No such overarching constitutional right is implicated here. Instead, the respect for the "label" given by the federal courts to foreclose appellate review of remand orders advances the constitutional principle that federal courts are courts of limited jurisdiction. Respondents cite no case suggesting that judgments of acquittal should be treated the same as remand orders. *Thermtron* explained that § 1447(d) prohibits review when the district court "purports" to base remand on a determination that it lacks subject-matter

jurisdiction. 423 U.S. at 343. In any event, under any reasonable view, the district courts' remand orders here concerned subject-matter jurisdiction under § 1447(c), which brings them within the prohibition on appellate review of § 1447(d).[2]

Finally, respondents claim that review "would better serve Congress's expressed interest in uniformity in private securities litigation." Br. 37. In SLUSA, Congress sought certain uniformity between state and federal law by preempting disguised Rule 10b-5 claims brought under state law. Respondents invoke the very different interest in uniformity of decision among "each judicial district" in the federal system. *Id.* But Congress simply did not prescribe an unrelenting uniformity. Instead, Congress codified a "policy of not permitting interruption of the litigation of the merits of a removed cause by prolonged litigation of questions of jurisdiction of the district court to which the cause is removed." *United States v. Rice*, 327 U.S. 742, 751 (1946). This Court has long "assume[d] that Congress is 'aware of the universality of th[e] practice' of denying appellate review of remand orders when Congress creates a new ground for removal." *Things Remembered*, 516 U.S. at 128 (quoting *Rice*, 327 U.S. at 752) (alteration in original). In SLUSA, Congress declined to include "a clear statutory command to the contrary," *id.*, despite having done so in other statutes. *See* Pet. Br. 29-30. That congressional policy must be applied here.[3]

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[2] *Cf.* Law Professors Amicus Br. 10 ("'gradual evisceration' of the § 1447(d) bar"); *Dalrymple v. Great River Dam Auth.*, 145 F.3d 1180, 1185 n.8 (10th Cir. 1998) ("We fear such maneuvering [to avoid § 1447(d)] unnecessarily convolutes the law in this area and runs afoul of strong congressional policy against review of remand orders 'in order to prevent delay in the trial of remanded cases by protracted litigation of jurisdictional issues.' *Thermtron Prod., Inc.*, 423 U.S. at 351.").

[3] Congress has made similar policy judgments in other contexts. *Compare Cal. Pub. Empl. Ret. Sys. v. WorldCom, Inc.*, 368 F.3d 86, 103 (2d Cir. 2004) (federal interest in "centralizing bankruptcy litigation in a federal forum"); *and* U.S. Const. art. I, § 8, cl. 3 ("uniform Laws on the subject of Bankruptcies"), *with Things Remembered*, 516 U.S. at 128-29 (no review of jurisdictional remand orders in bankruptcy cases).

II. SLUSA MAKES REMOVAL JURISDICTION DEPENDENT ON PREEMPTION

The district courts correctly construed § 77p(c) to permit removal only of claims satisfying the preemption criteria "as set forth in subsection (b)." By cross-referencing SLUSA's preemption provision, § 77p(c) mandates that a covered class action involving a covered security cannot properly be removed unless it is preempted. *See* Pet. Br. 30-34. Because preemption is a jurisdictional prerequisite to removal under SLUSA, § 1447(d) bars review of the district courts' remand orders.

Respondents' contrary claim is that "SLUSA's removal provision is broader than its preclusion provision – that is, it confers subject-matter jurisdiction in the federal courts over some claims that are not precluded." Br. 19; *see* Br. 18-24. Thus, respondents contend, § 77p(c) requires only a "colorable" assertion of preemption. Br. 25-31. They then posit that, if the claim is found not to be preempted, remand is not required and the district court has "discretion" to order a remand. Br. 32-37. Respondents' theory conflicts with SLUSA's text and purposes, and produces the unintended result that state-law claims *not* preempted by SLUSA may remain in federal court.

A. SLUSA's removal provision is coextensive with its preclusion provision.

1. Congress's inclusion of the phrase "as set forth in subsection (b)" in § 77p(c) reflects that, under SLUSA, state-law claims that are in fact disguised Rule 10b-5 claims must be pursued in federal court subject to, *inter alia*, heightened pleading requirements, a stay of discovery while a motion to dismiss is pending, and a safe harbor for forward-looking statements by issuers. *See Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 126 S. Ct. 1503, 1511 (2006) (SLUSA enacted "'to prevent *certain* State private securities class action lawsuits *alleging fraud* from being used to frustrate the objectives of the [PSLRA]'") (quoting SLUSA § 2(5)) (emphases added); H.R. Conf. Rep. No. 105-803, at 13 (1998) ("Under the legislation, class actions relating to a 'covered security' . . .

alleging fraud or manipulation must be maintained pursuant to the provisions of Federal securities law, in Federal court"); Resp. Br. 1-2.

But Congress expressed no intent to re-channel state claims *not* subject to the PSLRA into federal court for a trial applying state-law principles of liability. *See* Pet. Br. 3-4. As respondents maintain, "Congress included the removal provision to ensure that *precluded* actions do not proceed in state court." Br. 22 (emphasis added). Thus, the "removal provision 'is designed to prevent a State court from inadvertently, improperly, or otherwise maintaining jurisdiction over an action *that is preempted*.'" *Id.* (quoting H.R. Rep. No. 105-640, at 16 (1998)) (emphasis added).

That reading is confirmed by § 77p(d), which specifically preserves certain state claims that would otherwise be preempted by § 77p(b) and mandates remand of those preserved actions to state court. *See* 15 U.S.C. § 77p(d); Pet. Br. 5 n.2; Resp. Br. 35. There is no reason to think that Congress intended a different result for other purely state-law claims not preempted in the first place.

2. Respondents (at 19-20) invoke *Arbaugh*'s statement that a statutory element should be treated as jurisdictional "[i]f the Legislature clearly states" that it is "jurisdictional." 126 S. Ct. at 1245. In *Arbaugh*, however, the Title VII employee-numerosity requirement at issue was contained in a "definitions" section of the statute defining 13 terms; Title VII's jurisdictional provision was in an entirely different section.[4] There is no such structural separation here. Section 77p(c) clearly authorizes removal of "[a]ny covered class action brought in any State court involving a covered security, as set forth in subsection (b)." Whether a federal question exists to support removal of purely state-law claims plainly raises a question of subject-matter jurisdiction and each statute must be read on its own terms. *See id.* at 1245 n.11 ("Congress

[4] *See Arbaugh*, 126 S. Ct. at 1245 (Congress could have made the employee-numerosity requirement "jurisdictional" if it had wanted to).

has exercised its prerogative to restrict the subject-matter jurisdiction of federal district courts based on a wide variety of factors, some of them also relevant to the *merits* of a case.") (emphasis added).

Respondents (at 20) next defend the Seventh Circuit's ruling that the "covered class action" element of § 77p(c) is jurisdictional while the preemption element is not, citing a footnote in *Dabit*, 126 S. Ct. at 1512 n.7 ("Another key provision of the statute makes all 'covered class actions' filed in state court removable to federal court."). SLUSA's removal provision was not at issue in *Dabit* – that case was filed in *federal*, not state, court (*see id.* at 1507) – and this Court has held numerous times (including in *Arbaugh*) that such passing dicta is not precedential. "Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Webster v. Fall*, 266 U.S. 507, 511 (1925).[5]

Respondents assert that the words "any" and "involving" as used in § 77p(c) indicate that non-preempted claims are nevertheless removable because "[t]hese are terms of inclusion, not limitation." Br. 20; *see* Br. 20-21, 22-23. But that contention ignores the context in which those terms appear. "*Any* covered class action brought in any State court *involving* a covered security, as set forth in subsection (b)" is most naturally read to encompass those actions described in "subsection (b)," not to broaden removability beyond those actions so described. *See, e.g.*, *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991) (meaning of words in statute depends on context). The words "any" or "involving" signify only that claims

[5] CAFA does not reflect an understanding that SLUSA bases removal solely on the existence of a "covered security." *See* Resp. Br. 21 n.6. As noted in the text, even respondents concede (as did the Seventh Circuit) that removal jurisdiction also requires, at a minimum, that the case involve a "covered class action." Br. 29 n.9; *see also United States v. Price*, 361 U.S. 304, 313 (1960) (views of later Congress a "hazardous basis for inferring the intent of an earlier one").

meeting the three removability criteria – the action is a covered class action, it involves a covered security, and it is preempted under § 77p(b) – may be removed.[6]

Respondents next contend (at 21-22, 23) that reading the clause "as set forth in subsection (b)" to authorize removal only of preempted claims would render superfluous the final clause of 77p(c), which states that removed actions "shall be subject to subsection (b)." The two clauses can easily be read to perform different functions, however. The first clause defines *which* actions may be removed; the second clause directs that such a removable action shall be dismissed as preempted. *See Scheidler v. NOW*, 126 S. Ct. 1264, 1273 (2006) (rule against surplusage is not violated if each clause performs a function). Even assuming some overlap in those related commands, they need not be read as coextensive and thus superfluous. *Cf. Shook v. District of Columbia Fin. Responsibility & Mgmt. Assistance Auth.*, 132 F.3d 775, 782 (D.C. Cir. 1998) ("Sometimes Congress drafts statutory provisions that . . . appear duplicative of others – simply, in Macbeth's words, 'to make assurance double sure.'"). In any event, construing the last clause of § 77p(c) as merely confirmatory of the earlier clause is far more faithful to Congress's purposes than is respondents' construction, which ascribes to Congress an intent wholly at odds with SLUSA. Given what Congress was trying to accomplish in SLUSA – stemming the tide of Rule 10b-5-type claims that had flowed into state court – it would be anomalous to read

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[6] The title of § 77p(c) – "Removal of covered class actions" – does not erase the limiting phrase "as set forth in subsection (b)" in the text of the statute. *See United States v. Minker*, 350 U.S. 179, 185 (1956) ("the title of a statute and the heading of a section cannot limit the plain meaning") (quotation marks omitted). Indeed, applying respondents' same logic to the phrase "involving a covered security" would read that limitation out of the statute as well. In *INS v. National Center for Immigrants' Rights, Inc.*, 502 U.S. 183 (1991), relied on by respondents (at 21), the Court deferred to the "agency's reasonable, consistently held interpretation of its own regulation" in relying on the title of an ambiguous regulation. *See* 502 U.S. at 189-90. No such principle of agency deference applies here.

§ 77p(c) to launch into federal court *non*-Rule 10b-5 (and therefore non-preempted) claims to be adjudicated on the merits by the district court.

Respondents next focus on the sentence in the legislative history stating that § 77p(c) "'provides that any class action described in subsection (b) that is brought in a State court *shall* be removable to a Federal district court, and *may* be dismissed pursuant to the provisions of subsection (b).'" Br. 21 (quoting H.R. Rep. No. 105-640, at 16; S. Rep. No. 105-182, at 8 (1998)) (emphases added by respondents). Respondents assert that this use of "shall" and "may" "can only be read to mean that *some* actions that are removable are *not* precluded." Br. 23. Whatever ambiguity may have been created in that sentence is clarified in the report's very next sentence, which makes clear that Congress's concern was solely with the removal of claims that SLUSA actually (not arguably) preempts: "This provision [§ 77p(c)] is designed to prevent a State court from inadvertently, improperly, or otherwise maintaining jurisdiction over an action that is preempted pursuant to subsection (b)." H.R. Rep. No. 105-640, at 16.

That sentence confirms that Congress's focus was on keeping preempted claims out of state courts; but nowhere did Congress suggest in SLUSA that (in the absence of complete diversity) it wanted to re-channel non-preempted state claims into the federal courts for federal adjudication of the merits of purely state-law claims. *See supra* pp. 8-9. Accordingly, any ambiguity arguably shown by respondents in parsing selected words and phrases of the statute and its legislative history – and they have shown none – necessarily disappears in light of the goals Congress sought to achieve in SLUSA.[7]

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[7] Respondents claim that Congress's use of "shall" in § 77p(d)(4) indicates that other, non-preempted actions "'*may* be remanded.'" Br. 35 (citing *Martin v. Franklin Capital Corp.*, 126 S. Ct. 704, 709 (2005)). Unlike here, in *Martin* "may" was used in juxtaposition to several other uses of "shall" in the same statutory subsection.

Indeed, Congress expressly provided that certain claims meeting § 77p(b)'s preemption criteria nonetheless are preserved by § 77p(d) and "shall" be remanded to state court. 15 U.S.C. § 77p(d)(4). Congress was silent on the remand of claims that did not meet the preemption criteria. The logical inference, given SLUSA's text, structure, and purpose, is that Congress assumed such claims are not properly removable to begin with.

B. SLUSA requires a successful defense of preemption – a "colorable" argument is insufficient for removal.

1. Respondents concede that, under the well-pleaded complaint rule, they ordinarily would have no right to remove based on a federal preemption defense. *See* Br. 16, 31. They correctly note that "Congress has acted on occasion to make state-law actions removable *solely* on the basis of a substantial federal question presented as a *defense*," thus abrogating the well-pleaded complaint rule in certain contexts. Br. 16. But respondents erroneously assert that, "[w]hen Congress has done so, it has always been recognized that the removing defendants need not prove the merits of the defense to invoke the subject-matter jurisdiction of the federal court; rather, such a case is within the removal jurisdiction if the federal defense is 'colorable' (non-frivolous)." Br. 16-17; *see also* Br. 25.

The text and structure of SLUSA, however, align squarely with the "complete preemption" doctrine, under which this Court has held repeatedly that state-law claims are removable *if and only if* federal law completely preempts them; a "colorable" preemption defense is inadequate to justify removal. *See* Pet. Br. 34-36. Respondents relegate the complete preemption doctrine to a passing footnote, arguing that it "applies only where Congress has *not* expressly provided for federal jurisdiction." Br. 19 n.5. But it is immaterial whether Congress provided "expressly" for complete preemption or this Court interpreted Congress's regulation to have done so. SLUSA operates the same way as the complete preemption doctrine. *See* Pet. Br. 35-36; Law Professors Amicus Br. 15-16.

That is precisely how respondents understood SLUSA to work at the removal stage in the district court – before they sought to avoid the non-reviewability bar of § 1447(d). Respondents' own removal papers argued that the cases here were removable precisely because they were preempted, setting forth all four of the § 77p(b) preemption criteria and claiming that each criterion was met. *See* Pet. Br. 33-34 & nn.41-42. In this Court, respondents decline to explain their multiple removal pleadings in any other way, and, indeed, acknowledge that, "[w]here a case is removable on the basis of a federal defense, the courts look to the removal papers to establish the bases for federal jurisdiction." Br. 8, 28.[5]

2. Respondents point to cases interpreting the federal officer removal statute in asserting that only a "colorable" federal defense is necessary to create removal jurisdiction under SLUSA. *See* Br. 25-28. But merely because Congress *can* base removal on the assertion of a "colorable" federal defense, as it has in that context, does not mean that SLUSA must be interpreted in the same way. Like the complete preemption doctrine, actual (rather than colorable) preemption is the *sine qua non* of SLUSA removal.

Moreover, the federal officer removal cases rest on "the very basic interest in the enforcement of federal law through federal officials." *Willingham v. Morgan*, 395 U.S. 402, 406 (1969). Determining whether a federal officer was in fact acting within the scope of his or her official duties may often be a fact-intensive inquiry, and the

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[5] Respondents' counsel of record in this Court argued to the district court to justify removal jurisdiction: "SLUSA's *preemptive* provisions authorize *removal* and dismissal of lawsuits filed in state court that meet four basic requirements: (1) the underlying suit must be a 'covered class action'; (2) the claim must purport to be based on state law; (3) the defendant must be 'alleged to have misrepresented or omitted a material fact (or to have used or employed any manipulative or deceptive device or contrivance)'; and (4) the defendant must be 'alleged to have engaged in conduct described by criterion (3) "in connection with" the purchase or sale of a "covered security."' *Green v. Ameritrade, Inc.*, 279 F.3d 590, 596 (8th Cir. 2002)." Defs.' Opp. to Mot. to Remand at 5 (*Potter*, Dist. Ct. Docket Entry 43) (emphases added).

federal interest in having a federal rather than a state jury pass on such questions is obvious. *See id.* at 409 ("If the question raised is whether [the federal officers] were engaged in some kind of 'frolic of their own' in relation to [the federal prisoner], then they should have the opportunity to present their version of the facts to a federal, not a state, court."). Under SLUSA, by contrast, the allegations in the complaint need only be measured against SLUSA's preemption criteria. This Court's complete preemption decisions likewise have simply compared the allegations in the complaint to the statutory scheme.[9]

Respondents also assert that "the *sole* purpose of SLUSA's removal provision is to have the preclusion defense . . . decided by a federal court." Br. 27. Just as in the complete preemption context, however, the federal court must determine whether SLUSA preemption applies; if it does, then the case is removable. Respondents cite the "'magnitude of the federal interest in protecting the integrity and efficient operation of the market for nationally traded securities.'" *Id.* (quoting *Dabit*, 126 S. Ct. at 1509). But they ignore that SLUSA's purpose was not to re-channel *non*-preempted claims arising solely under state law into federal court for adjudication on the merits. Instead, Congress sought to re-channel preempted state-law claims into federal court for dismissal.

Respondents implicitly recognize that their reliance on the federal interest in securities regulation does not extend to the adjudication of non-preempted, purely state-law claims in federal court, and thus assert that such

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[9] *See, e.g., Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 7 (2003) ("*Avco* stands for the proposition that if a federal cause of action completely pre-empts a state cause of action *any complaint* that comes within the scope of the federal cause of action necessarily 'arises under' federal law.'") (quoting *Franchise Tax Bd. v. Construction Laborers Vacation Trust for Southern California*, 463 U.S. 1, 23-24 (1983)) (emphasis added); *Aetna Health Inc. v. Davila*, 542 U.S. 200, 211 (2004) (assessing complete preemption under ERISA by examining the "complaints, the [state] statute on which the[] claims are based . . . , and the various [employer health benefit] plan documents").

claims should be *remanded* to state court. Respondents first concoct the counterfactual theory that the district courts' orders in this case were "discretionary" remands, rather than mandatory remands for lack of subject-matter jurisdiction. Br. 32. They then seek to justify those so-called "discretionary" remands as similar to remands of pendent state claims once the federal claims giving the court original federal-question jurisdiction have been dismissed. *See* Br. 32-37. But those machinations only reinforce the illogic of respondents' theory. There was never a federal claim to begin with, and therefore nothing to which petitioners' state-law claims could be "pendent."

3. Because SLUSA preempts only state-law covered class actions alleging Rule 10b-5-like fraud or manipulation, petitioners' negligence and recklessness claims are not preempted. *See* Pet. Br. 42-45. Although *Dabit* held that holder claims meet the "in connection with" criterion and thus fall within the ambit of Rule 10b-5 and § 77p(b), it did not address whether market-timing claims alleging negligence fall within those provisions, and respondents make no such claim. Thus, while the state court will certainly be required to apply *Dabit*'s ruling that holder claims fall within the "in connection with" language of Rule 10b-5 and § 77p(b), it may examine in the first instance whether petitioners' non-fraud claims fall within those provisions.

Accordingly, the Court should make clear that, on remand, the state court is not bound by the Seventh Circuit's April 5, 2005 opinion (*see* Pet. App. 1a-9a), which was rendered without jurisdiction and is therefore null and void. In that opinion, the court of appeals erred in concluding that petitioners "affirmatively repudiated" the argument that their claims do not depend on allegations of fraud or manipulation. Resp. Br. 30. Because SLUSA preemption raises a question of federal subject-matter jurisdiction, these arguments cannot be waived. *See* Pet.

Br. 44-45.[10] And, in any event, petitioners repeatedly stressed in their brief and oral argument before the Seventh Circuit that they were not alleging fraud, but were claiming that respondents acted negligently and recklessly in failing to adopt practices that would protect petitioners' assets from the dilution in value caused by market timing.[11] Respondents' assertions and the Seventh Circuit's view are at odds with an undisputed record.

Respondents further assert that petitioners' complaints depend on allegations of fraud. Although respondents quote nothing in support, they apparently rely on the allegations that respondents failed to protect their funds from market timing,[12] while at the same time "convincing investors . . . to hold their fund shares by urging investors to invest for the long term and by effectively marketing the various advantages of long term ownership of funds over direct investment."[13] But petitioners have not sought relief based on respondents' fraudulent representations about their funds. Instead, they seek relief on the ground that respondents acted negligently and recklessly by failing to follow practices that would protect petitioners'

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[10] Respondents (at 31) mistakenly assert that, because this Court did not independently analyze whether fraud was alleged in *Dabit*, it must have held that element to be non-jurisdictional. *Dabit* was filed in federal court based on complete diversity, so the Court had no occasion to decide any removal jurisdiction issues. *See supra* p. 9.

[11] *See, e.g.*, 7th Cir. 1/7/05 Tr. 18:18-20 ("[Petitioners] [we]re not bringing a claim that they were misled in any way to buy the stock."); *id.* at 21:6-7 ("The allegation is negligent valuation of the shares under state law."); Pet. C.A. Br. 4 ("[Petitioners] have sued the Funds and the Funds' Managers for negligently or recklessly failing to calculate the Funds' share prices accurately."); *see also* Pet. Br. 44. Respondents tellingly do not quote the transcript, because nothing in it can be read to support the court of appeals' "affirmative repudiation" ruling.

[12] *See* JA 174-77 (*Potter*), 197-200 (*Kircher*), 223-25 (*Parthasarathy*), 249-52 (*Dudley I*), 267-70 (*Dudley II*), 284-87 (*Vogeler*), 301-03 (*Jackson*), 316-18 (*Spurgeon*).

[13] JA 169 (*Potter*), 192 (*Kircher*), 218 (*Parthasarathy*), 244 (*Dudley I*), 262 (*Dudley II*), 279 (*Vogeler*), 296 (*Jackson*), 312 (*Spurgeon*).

assets from the dilution in value caused by a failure to set price at fair value. *See* Pet. Br. 44 & n.53.

Respondents also quote out of context petitioners' statement that SLUSA does not preclude claims brought by "'current holders who are fraudulently lulled into continuing to hold.'" Br. 32 n.11 (quoting Pls.' Mot. to Remand at 7 (*Kircher*, Dist. Ct. Docket Entry 20)) (emphasis omitted). The full quotation, however, makes clear that petitioners made that statement only to illustrate that *all* holder claims, *including* those based on allegations of fraud, did not meet the "in connection with" requirement based on then-existing law.[14] Accordingly, holder claims *not* asserting fraud are not preempted by SLUSA. Petitioners never indicated in their remand motions (or elsewhere) that their claims depended on allegations of fraud. Rather, petitioners emphatically stated in their remand motions that they "have ***not*** contended[] 'that defendants misrepresented that the Funds were appropriate for long-term buy-and-hold investors,' nor have [they] made any allegation that the defendants 'misrepresented the NAVs of the Funds' shares' or 'that defendants misrepresented and omitted material facts concerning plaintiffs' investments and the value of the Funds' shares.'" *Kircher* Mot. to Remand at 5 (quoting Notice of Removal ¶ 16 (JA 349)).

III. *WACO* DOES NOT AUTHORIZE REVIEW

Because the Seventh Circuit's erroneous rulings on the fraud element of SLUSA preemption were rendered without appellate jurisdiction, they cannot stand. To avoid that result, respondents assert as a fallback that, "even if the Court were to conclude that the remands in this case were based on a lack of subject-matter jurisdiction," Br.

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[14] It read: "Non-sellers and non-purchasers, such as prospective purchasers who are fraudulently deterred from purchasing or current holders who are fraudulently lulled into continuing to hold their securities, do not have cognizable claims under the '34 Act as a matter of thoroughly well-established law." *Kircher* Mot. to Remand at 7. That statement merely advanced the pre-*Dabit* view that all holder claims – even those based on fraud – were not preempted by SLUSA. Petitioners here have not brought fraud claims in their complaints.

41-42, SLUSA preemption decisions are nevertheless reviewable under *City of Waco v. United States Fidelity & Guaranty Co.*, 293 U.S. 140 (1934). Respondents then reason (at 46) that "the Seventh Circuit's determination that the actions are precluded by SLUSA – which has since been approved by this Court in *Dabit* – would be binding and the cases would be dismissed by the state courts." Respondents misunderstand *Waco* and misstate the preclusive effect in state court of the district courts' jurisdictional determinations.

In *Waco*, a citizen of Texas sued the City of Waco, Texas, in state court. Waco filed a cross-complaint for indemnity against Fidelity, a citizen of Maryland, and Fidelity removed the entire case to federal court based on diversity (claiming that the cross-suit was a "separable" controversy obviating the need for complete diversity). The district court agreed that a separable controversy was presented and jurisdiction was thus proper, but it then dismissed Fidelity as "an unnecessary and improper party"; and "since, upon that dismissal, there was no diversity of citizenship of the remaining parties, the court held it lacked jurisdiction, and remanded the cause to the state court." *Id.* at 142. The City appealed, "not from the order of remand, but from that dismissing its action against . . . Fidelity." *Id.* This Court held that, although "no appeal lies from the order of remand," appellate review of the order of dismissal was proper because "in logic and in fact the decree of dismissal preceded that of remand and was made by the District Court while it had control of the cause." *Id.* at 143. The Court made clear that it was "[i]ndisputably this order," and not the remand order, that was "the subject of . . . appeal." *Id.*[15]

Respondents' theory ignores that *Waco* found jurisdiction proper because the City appealed "not from the order of remand, but from that dismissing its action against . . .

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[15] This Court has cited *Waco* only once, in order to reaffirm the rule that § 1447(d) "precludes review of the remand order directly or indirectly." *Metropolitan Cas. Ins.*, 312 U.S. at 568 (citations omitted).

Fidelity." By contrast, respondents' notices of appeal appealed only from orders "remanding" the actions.[16] No district court here entered a separately appealable order concluding that petitioners' claims were not preempted. Rather, the district courts examined the preemption question only to determine whether they had removal jurisdiction (indeed, that was the same theory of SLUSA advanced in respondents' removal papers). Courts have understood *Waco* to mean that, "[i]f the court looks to an issue *for the purpose* of determining subject matter jurisdiction, the issue is not separable because it cannot be said to have preceded the remand decision 'in logic *and in fact*.'" *Powers v. Southland Corp.*, 4 F.3d 223, 228 (3d Cir. 1993) (quoting *Waco*, 293 U.S. at 143) (emphasis added by *Powers*).

Waco does not apply when a court addresses a question of substantive law that is "intrinsic to the district court's decision to remand for lack of subject matter jurisdiction." *Calderon v. Aerovias Nacionales de Columbia*, 929 F.2d 599, 602 (11th Cir. 1991) (remand decision holding that Warsaw Convention did not preempt plaintiff's state-law claims held unreviewable); *see also, e.g., Nutter v. Monongahela Power Co.*, 4 F.3d 319, 321 (4th Cir. 1993) (rejecting reliance on *Waco* where "the court's findings regarding preemption and jurisdiction are indistinguishable"). Under SLUSA, the preemption decision is intrinsic to the jurisdictional determination. Respondents identify no case applying *Waco* to find reviewable a preemption ruling on which subject-matter jurisdiction was based, and they do not dispute that courts of appeals uniformly hold that orders by district courts rejecting a complete preemption defense are unreviewable. *See* Pet. Br. 35 & n.44 (citing cases); Law Professors Amicus Br. 16 n.8.[17]

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[16] *See* JA 41 (Parthasarathy), 49 (Kircher), 56 (Potter), 64 (Vogeler), 69 (Dudley I), 75 (Dudley II), 79 (Jackson), 84 (Spurgeon).

[17] Respondents' reliance on learned treatises is misplaced. *Compare* Resp. Br. 41, 47, *with* 16 *Moore's Federal Practice* § 107.14[2][a][ii], at 107-254.3 (3d ed. 2005) (*Waco* inapplicable where the decision is "nec-

Respondents also assert that they will be precluded in state court from litigating the SLUSA preemption issue. *See* Br. 44. Not so. "Under contemporary principles of collateral estoppel," the inability to pursue an appeal is a "factor strongly militat[ing] against giving a [judgment] preclusive effect." *Standefer v. United States*, 447 U.S. 10, 23 (1980) (judgment of acquittal). Respondents ignore the cases rejecting reliance on *Waco* because "a district court's findings incident to an order of remand have no preclusive effect." *Nutter*, 4 F.3d at 322 (rejecting reliance on *Waco*) (citing cases); *see* Chamber of Commerce Amicus Br. 16 (discussing state-court holdings that litigation of SLUSA preemption is not precluded).[18]

The state court on remand will apply *Dabit*'s ruling that holder claims fall under the "in connection with" language of Rule 10b-5 and thus § 77p(c). And, because the Seventh Circuit had no jurisdiction for its holding with respect to the fraud criterion – and it is not justified by *Waco* – the state court may address in the first instance petitioners' argument that their complaints, fairly read, do not allege fraud and are not preempted by SLUSA.

CONCLUSION

The judgment of the court of appeals should be reversed.

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essary to determine whether the [district] court has subject matter jurisdiction"), *and* 15A Charles Alan Wright, *et al.*, *Federal Practice and Procedure* § 3914.11, at 711-12 (2d ed. 1992) (appeal may lie from "disposition on the merits before the balance of the case is remanded" but the "remand order [can]not be reviewed as part of the appeal").

[18] *See also, e.g.*, *Rogers v. Tyson Foods, Inc.*, 308 F.3d 785, 791 (7th Cir. 2002) (preemption question open on remand despite rejection of complete preemption defense in finding no jurisdiction); *Lyons v. Alaska Teamsters Employer Serv. Corp.*, 188 F.3d 1170, 1173 (9th Cir. 1999) (no preclusion on remand because "any consideration of the merits of the preemption defense was in the context of determining jurisdiction"); *Soley v. First Nat'l Bank of Commerce*, 923 F.2d 406, 410 (5th Cir. 1991) (interpreting remand order "as jurisdictional," so state court "will have an opportunity to consider the appellants' preemption defense and the district court's order will have no preclusive effect").

Respectfully submitted,

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April 14, 2006

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

KIRCHER ET AL. *v.* PUTNAM FUNDS TRUST ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 05–409. Argued April 24, 2006—Decided June 15, 2006

The Securities Litigation Uniform Standards Act of 1998 (Act) specifies that private state-law "covered" class actions alleging untruth or manipulation "in connection with the purchase or sale" of a "covered" security may not "be maintained in any State or Federal court," 15 U. S. C. §77p(b), and authorizes removal to federal district court of "[a]ny covered class action brought in any State court involving a covered security, as set forth in subsection (b)." §77p(c). "A 'covered class action' is a lawsuit in which damages are sought on behalf of more than 50 people. A 'covered security' is one traded nationally and listed on a regulated national exchange." *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U. S. ___, ___.

Petitioners, mutual fund investors, filed separate state-court actions, each seeking to assert state-law claims on behalf of a class of investors allegedly injured by devaluation of their holdings by respondent mutual funds. The funds filed notices of removal in each case stating, among other things, that the actions were removable under and precluded by the Act. Once removed, however, the Federal District Court remanded each case to state court on the ground that it lacked subject-matter jurisdiction on removal because the Act did not preclude the investors' claims. Since they were said to have been injured as "holders" of mutual fund shares, not purchasers or sellers, the court reasoned, their claims did not satisfy §77p(b)'s "in connection with the purchase or sale" requirement, and the claims could therefore proceed in state court. The Seventh Circuit acknowledged that 28 U. S. C. §1447(d) bars review of district court orders remanding removed cases for lack of subject-matter jurisdiction, but decided that the District Court had the last word neither on the characterization of its decision as jurisdictional nor on the correctness of its con-

clusion that remand was required. The appeals court considered all covered class actions involving covered securities, whether precluded or not, to be removable under the Act, and therefore thought the preclusion issue distinct from the jurisdictional issue whether the case belonged in federal court at all. It held that orders remanding "properly removed" suits as not precluded are substantive and unaffected by §1447(d), and therefore reviewable. Proposing that the Act reserves to the Federal Judiciary the exclusive authority to make the preclusion decision, the court said that treating remand orders in this context as immunized from appeal by §1447(d) would mean that a major substantive issue would escape review, since it would not be open to resolution in the state court subject to review by this Court. The Seventh Circuit subsequently consolidated the funds' appeals and decided, on the merits, that the Act precludes the investors' claims.

Held: Orders remanding for want of preclusion under the Act are subject to §1447(d) and its general rule of nonappealability. Pp. 5–14.

(a) Section 1447(d), which states that an "order remanding a case to the State court from which it was removed is not reviewable on appeal," applies to all remands based on the grounds specified in §1447(c), including lack of subject-matter jurisdiction. *Thermtron Products, Inc.* v. *Hermansdorfer*, 423 U. S. 336, 343–345. It applies equally to cases removed under the general removal statute, §1441, and to those removed under other provisions, see *Things Remembered, Inc.* v. *Petrarca*, 516 U. S. 124, 128, and its force is not subject to any statutory exception that might cover this case. The District Court said that it was remanding for lack of jurisdiction, an unreviewable ground. Where a remand order is based on one of §1447(c)'s grounds, review is unavailable no matter how plain the legal error in ordering the remand. *Briscoe* v. *Bell*, 432 U. S. 404, 413, n. 13. The Seventh Circuit did not overlook cases like *Briscoe*, but relied instead on cases such as *Kontrick* v. *Ryan*, 540 U. S. 443, which observed that some rulings loosely called jurisdictional are patently not jurisdictional in the strict sense. Viewing this as such a case, the appeals court understood the District Court's preclusion decision to be substantive, not jurisdictional, and consequently subject to review. But the District Court was correct in understanding its remand order to be dictated by a finding that it lacked removal jurisdiction. Section 77p(c)'s authorization for removal, on which district-court jurisdiction depends, is confined to cases "set forth in subsection (b)," *i.e.*, those with claims of untruth or manipulation. That phrase immediately follows the §77p(c) language describing removable cases as covered class actions involving covered securities, and the language has no apparent function unless it limits removal to covered class actions involving claims like untruth or deception. Legislative history tends to show

Syllabus

that this was just what Congress understood. The preclusion determination is jurisdictional, as is the order implementing it. Pp. 5–11.

(b) The Seventh Circuit's reading was in part motivated by the court's erroneous assumption that the Act gives federal courts exclusive jurisdiction to decide the preclusion issue. A covered action is removable if it is precluded, and a defendant can enlist the Federal Judiciary to decide preclusion, but he can elect to leave the case where the plaintiff filed it and trust the state court to make the preclusion determination. What a state court could do in the first place it may also do on remand; here, the funds can ask for dismissal on preclusion grounds when they return to state court. Collateral estoppel should be no bar to such a revisitation, given that §1447(d) prevents the funds from appealing the District Court's decision. While the state court cannot review the decision to remand in an appellate way, it is free to reject the remanding court's reasoning. *Id.*, at 583. There is no reason to doubt that the state court in this litigation will duly apply *Dabit*'s holding that holder claims are embraced by §77p(b), but this Court can review any claim of error on that point. Pp. 11–14.

403 F. 3d 478, vacated and remanded.

SOUTER, J., delivered the opinion of the Court, in which ROBERTS, C. J., and STEVENS, KENNEDY, THOMAS, GINSBURG, BREYER, and ALITO, JJ., joined, and in which SCALIA, J., joined as to Parts I, III, and IV. SCALIA, J., filed an opinion concurring in part and concurring in the judgment.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 05–409

CARL KIRCHER, ET AL., PETITIONERS *v.* PUTNAM FUNDS TRUST ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

[June 15, 2006]

JUSTICE SOUTER delivered the opinion of the Court.

Title 28 U. S. C. §1447(d) limits appellate review of a district court order remanding a case from federal to state court. The question here is whether an order remanding a case removed under the Securities Litigation Uniform Standards Act of 1998 is appealable, notwithstanding §1447(d). We hold it is not.

I

The Private Securities Litigation Reform Act of 1995 (Reform Act), 109 Stat. 737, targeted "perceived abuses of the class-action vehicle in litigation involving nationally traded securities," *Merrill Lynch, Pierce, Fenner & Smith Inc.* v. *Dabit*, 547 U. S. ___, ___ (2006) (slip op., at 8), and put limits on federal securities class actions. But Congress soon discovered that "[r]ather than face the obstacles set in their path by the Reform Act, plaintiffs and their representatives [were] bringing class actions under state law, often in state court," *id.*, at ___ (slip op., at 9). To block this bypass of the Reform Act, Congress enacted the Securities Litigation Uniform Standards Act of 1998 (Act), 112 Stat. 3227; see *Dabit, supra*, at ___ (slip op., at 8–10).

The Act has a preclusion provision[1] and a removal provision[2]: it provides that private state-law "covered" class actions alleging untruth or manipulation in connection with the purchase or sale of a "covered" security may not "be maintained in any State or Federal court," 112 Stat. 3228 (codified at 15 U. S. C. §77p(b)),[3] and it authorizes removal to federal district court of "[a]ny covered class action brought in any State court involving a covered security, as set forth in subsection (b)," 112 Stat. 3228 (codified at §77p(c)). "A 'covered class action' is a lawsuit in which damages are sought on behalf of more than 50 people. A 'covered security' is one traded nationally and listed on a regulated national exchange." *Dabit, supra,* at

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[1] "No covered class action based upon the statutory or common law of any State or subdivision thereof may be maintained in any State or Federal court by any private party alleging—

"(1) an untrue statement or omission of a material fact in connection with the purchase or sale of a covered security; or

"(2) that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security." 112 Stat. 3228 (codified at 15 U. S. C. §77p(b)).

The preclusion provision is often called a preemption provision; the Act, however, does not itself displace state law with federal law but makes some state-law claims nonactionable through the class action device in federal as well as state court. See *Merrill Lynch, Pierce, Fenner & Smith Inc.* v. *Dabit,* 547 U. S. ___, ___ (2006) (slip op., at 15) ("The Act does not deny any individual plaintiff, or indeed any group of fewer than 50 plaintiffs, the right to enforce any state-law cause of action that may exist").

[2] "Any covered class action brought in any State court involving a covered security, as set forth in subsection (b) of this section, shall be removable to the Federal district court for the district in which the action is pending, and shall be subject to subsection (b) of this section." 112 Stat. 3228 (codified at 15 U. S. C. §77p(c)).

[3] The Act amends "in substantially identical ways," *Dabit, supra,* at ___, n. 6 (slip op., at 10, n. 6), both the Securities Act of 1933, 48 Stat. 74, and the Securities Exchange Act of 1934, 48 Stat. 881. For the sake of simplicity, the Seventh Circuit relied exclusively on the amendments to the Securities Act of 1933, and for ease of reference we will do the same.

___ (slip op., at 10–11) (footnotes omitted).

Petitioners are eight groups of investors holding mutual fund shares, who filed separate actions in Illinois state courts, each group seeking to represent a class of investors allegedly injured by devaluation of their holdings by respondents (mutual funds, investment advisors, and an insurance company) (hereinafter collectively the funds).[4] The eight complaints asserted only state-law claims, such as negligence and breach of fiduciary duty.

The funds filed notices of removal to federal district court in each case stating, among other things, that the actions were removable under and precluded by the Act. Once in the District Court, however, the investors argued that the cases should be remanded for lack of subject matter jurisdiction, and in separate orders the District Court for the Southern District of Illinois remanded each case to state court on the ground that the District Court lacked subject matter jurisdiction on removal because the Act did not preclude the investors' claims. Since the investors were said to have been injured as "holders" of mutual fund shares, not purchasers or sellers, the District Court reasoned, their claims did not satisfy the "in connection with the purchase or sale" requirement of the Act's preclusion provision, §77p(b),[5] and the claims could therefore proceed in state court. The District Court did not decide whether the claims otherwise met the Act's conditions for preclusion.

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[4]The investors claim that the funds facilitated the practice of "market timing," whereby traders of mutual fund shares exploit brief discrepancies between the stock prices used to calculate the shares' value once a day, and the prices at which those stocks are actually trading in the interim. Brief for Petitioners 6. The investors say that market timing is harmful to long-term holders of mutual fund shares and that the funds negligently or recklessly failed to adopt procedures to protect the value of the investors' long-term investments.

[5]As discussed in Part III, *infra*, we have since rejected this reasoning, see *Dabit*, *supra*, at ___ (slip op., at 16).

The funds filed notices of appeal from the remand orders, and in one of the cases, *Kircher* v. *Putnam Funds Trust*, the Seventh Circuit issued an opinion addressing the threshold question of its appellate jurisdiction. 373 F. 3d 847 (2004). The Court of Appeals acknowledged that 28 U. S. C. §1447(d) bars review of district court orders remanding for lack of subject matter jurisdiction, 373 F. 3d, at 849 (citing *Gravitt* v. *Southwestern Bell Telephone Co.*, 430 U. S. 723 (1977) *(per curiam)*), but decided that the District Court had the last word neither on the characterization of its decision as jurisdictional nor on the correctness of its conclusion that remand was required, see 373 F. 3d, at 849.

The Court of Appeals considered all covered class actions involving covered securities, whether precluded or not, to be removable under the Act, and for that reason thought the preclusion issue to be distinct from the jurisdictional issue of whether the case belonged in federal court at all. *Id.*, at 849–850. In the view of the Court of Appeals, if the District Court remanded because, for example, the class comprised too few investors to make the case a covered class action, that would be a jurisdictional decision that the case had been removed improperly, and the order would therefore be unreviewable in accordance with §1447(d). *Id.*, at 849. But the court held that orders remanding "properly removed" suits as not precluded by the Act are substantive, "unaffected by §1447(d)," *id.*, at 851, and therefore subject to appellate jurisdiction in the normal course.

As the Court of Appeals put it, once the District Court had made that substantive decision of no preclusion in this case, it was time for the court to bow out, not because it had lacked "adjudicatory competence" to begin with but because it had completed its work: "Once a court does all that the statute authorizes, there is no adjudicatory competence to do more. That is not the 'lack of subject-matter

jurisdiction' that authorizes a remand. Otherwise every federal suit, having been decided on the merits, would be dismissed 'for lack of jurisdiction' because the court's job was finished." *Id.*, at 850. This remand, the court concluded, was therefore not for want of jurisdiction, and review was not barred by §1447(d).

To satisfy itself that its decision made "practical sense," the court proposed that the Act reserves to the Federal Judiciary the exclusive authority to make the preclusion decision. *Ibid.* Treating remand orders in this context as immunized from appeal by §1447(d) would thus mean that "a major substantive issue in the case [would] escape review," since it would not be open to resolution in the state court subject to review by this Court. *Ibid.*

The Seventh Circuit subsequently consolidated the funds' appeals and decided, on the merits, that the Act does preclude the investors' claims. 403 F. 3d 478 (2005). We granted certiorari to resolve a split of authority on the question whether §1447(d) bars review of remand orders in cases removed under the Act,[6] 546 U. S. ___ (2006), and we now vacate for want of jurisdiction on the part of the Court of Appeals.

II

The policy of Congress opposes "interruption of the litigation of the merits of a removed cause by prolonged litigation of questions of jurisdiction of the district court to which the cause is removed," *United States* v. *Rice*, 327 U. S. 742, 751 (1946), and nearly three years of jurisdictional advocacy in the cases before us confirm the congressional wisdom. For over a century now, statutes have accordingly limited the power of federal appellate courts to

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[6] Compare 373 F. 3d 847 (CA7 2004) (case below), with *Spielman* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 332 F. 3d 116 (CA2 2003); *Abada* v. *Charles Schwab & Co.*, 300 F. 3d 1112 (CA9 2002); *Williams* v. *AFC Enterprises, Inc.*, 389 F. 3d 1185 (CA11 2004).

review orders remanding cases removed by defendants from state to federal court, see *id.*, at 748–752; *Thermtron Products, Inc.* v. *Hermansdorfer*, 423 U. S. 336, 346–348 (1976). The current incarnation is 28 U. S. C. §1447(d), which provides that an "order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise."[7] In *Thermtron*, we held that the bar of §1447(d) applies only to remands based on the grounds specified in §1447(c), that is, a defect in removal procedure or lack of subject matter jurisdiction. 423 U. S., at 343–345; see also *Things Remembered, Inc.* v. *Petrarca*, 516 U. S. 124, 127–128 (1995). So, we have approved appellate review of a remand expressly based on the District Court's crowded docket, see *Thermtron, supra*, at 340–341, and one based on abstention under *Burford* v. *Sun Oil Co.*, 319 U. S. 315 (1943), see *Quackenbush* v. *Allstate Ins. Co.*, 517 U. S. 706, 710–712 (1996). But we have relentlessly repeated that "any remand order issued on the grounds specified in §1447(c) [is immunized from all forms of appellate review], whether or not that order might be deemed erroneous by an appellate court." *Thermtron*, 423 U. S., at 351; see also *id.*, at 343 ("If a trial judge purports to remand a case on the ground that it was removed 'improvidently and without jurisdiction,' his order is not subject to challenge in the court of appeals" (quoting §1447(c) (1976 ed.))).

The bar of §1447(d) applies equally to cases removed under the general removal statute, §1441, and to those removed under other provisions, see *Things Remembered, Inc., supra*, at 128, and the force of the bar is not subject to any statutory exception that might cover this case.[8] Osten-

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[7] Title 28 §1447(d) specifically excepts certain civil rights actions from its bar; cf. §1443.

[8] "Absent a clear statutory command to the contrary, we assume that Congress is aware of the universality of th[e] practice of denying appellate review of remand orders when Congress creates a new ground

sibly, then, §1447(d) stands in the way of reviewing the District Court's orders of remand in the present cases. The District Court said that it was remanding for lack of jurisdiction, an unreviewable ground, and even if it is permissible to look beyond the court's own label, the orders are unmistakably premised on the view that removal jurisdiction under 15 U. S. C. §77p(c) is limited to cases precluded by §77p(b); on the District Court's understanding that "holder" claims are not subject to preclusion under §77p(b) of the Act, the court had no subject matter jurisdiction.[9] Since there was no indication that removal jurisdiction might exist on some ground other than §77p(c) (complete diversity, for example),[10] the remand orders were necessarily based on the trial court's conclusion that jurisdiction under §77p(c) was wanting. And "[w]here the order is based on one of the [grounds enumerated in 28 U. S. C. §1447(c)], review is unavailable no matter how plain the legal error in ordering the remand," *Briscoe* v. *Bell*, 432

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for removal." *Things Remembered*, 516 U. S., at 128 (internal quotation marks omitted), like 15 U. S. C. §77p(c). Congress has, when it wished, expressly made 28 U. S. C. §1447(d) inapplicable to particular remand orders. See, *e.g.*, §1447(d); 12 U. S. C. §1441a(l)(3)(C); §1819(b)(2)(C); 25 U. S. C. §487(d); cf. n. 6, *supra*. There is no such "clear statutory command" here, and that silence tells us we must look to 28 U. S. C. §1447(d) to determine the reviewability of remand orders under the Act.

[9] We take a pass on Justice Scalia's position that we may not look beyond the label, see *post*, at 3; the result here is the same whether we look near or far.

[10] These cases raise exclusively state-law claims seeking damages insufficient to satisfy the amount-in-controversy requirement of 28 U. S. C. §1332; in those instances in which the funds asserted diversity as a basis for subject matter jurisdiction, the District Court determined that no named plaintiff had a claim that met §1332's $75,000 threshold. See, *e.g.*, *Parthasarthy* v. *T. Rowe Price International Funds, Inc.*, No. 03–CV–0673–DRH (SD Ill., Jan. 30, 2004), App. to Pet. for Cert. 34a–37a; *Spurgeon* v. *Pacific Life Ins. Co.*, No. 04–CV–0355–MJR (SD Ill., June 24, 2004), App. to Pet. for Cert. 59a–60a.

U. S. 404, 413–414, n. 13 (1977).

The Court of Appeals did not, of course, overlook the cases holding that even a remand premised on an erroneous conclusion of no jurisdiction is unappealable; it relied instead on cases like *Kontrick* v. *Ryan*, 540 U. S. 443 (2004), and *Scarborough* v. *Principi*, 541 U. S. 401 (2004), which observed that some rulings loosely called jurisdictional are patently not jurisdictional in the strict sense, see 373 F. 3d, at 849 (citing *Kontrick*, *supra*; *Scarborough*, *supra*). The appeals court saw this as such a case; it understood that a district court had removal jurisdiction over any covered action under subsection (c), with the consequence that a subsequent order dismissing because of preclusion under subsection (b), or remanding because the action was not precluded, rested simply on an application of substantive law under subsection (b), law that was not jurisdictional at all.

We think, however, that the District Court was correct in understanding its remand order to be dictated by its finding that it lacked removal jurisdiction. Unlike the Court of Appeals, we read authorization for the removal in subsection (c), on which the District Court's jurisdiction depends, as confined to cases "set forth in subsection (b)," §77p(c), namely, those with claims of untruth, manipulation, and so on. The quoted phrase immediately follows the subsection (c) language describing removable cases as covered class actions involving covered securities, and the language has no apparent function unless it limits removal to covered class actions involving claims like untruth or deception. And legislative history tends to show that this was just what Congress understood. See S. Rep. No. 105–182, p. 8 (1998) (§77p(c) "provides that any class action described in Subsection (b) that is brought in a State court shall be removable to Federal district court, and may be dismissed pursuant to the provisions of sub-

section (b)"); H. R. Rep. No. 105–640, p. 16 (1998) (same).[11]

The funds argue that removal jurisdiction is broader by emphasizing the adjective that introduces subsection (c): "Any" covered action. §77p(c). But that suggestion would be persuasive only if we stopped reading right there, and we do not stop there; we do not read statutes in little bites. And, as just noted, if we did read the removal power that broadly there would be no point to the phrase "as set forth in subsection (b)," for subsection (b) cases would be removable anyway as a subset of covered class actions. *Ibid.* The funds purport to counter this objection with their argument that on our reading the last phrase of subsection (c) is redundant in providing that removed cases "shall be subject to subsection (b)," since subsection (b) cases would in any event be so subject. *Ibid.* The funds are in fact right about that redundancy, but the point does not count for their side, because the phrase is redundant on their reading, too: any subsection (b) case removed as falling within the broad category of covered class actions would be treated in accordance with subsection (b) if the subsection applied to that case. In sum, we see no reason to reject the straightforward reading: removal and jurisdiction to deal with removed cases is limited to those precluded by the terms of subsection (b).

Once removal jurisdiction under subsection (c) is understood to be restricted to precluded actions defined by subsection (b), a motion to remand claiming the action is not precluded must be seen as posing a jurisdictional issue. If the action is precluded, neither the District Court nor the state court may entertain it, and the proper course

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[11] Like the Court of Appeals here, we said in *Dabit* that a "key provision of the [Act] makes all 'covered class actions' filed in state court removable." 547 U. S, at ___, n. 7 (slip op., at 10, n. 7) (quoting 112 Stat. 3230). We sketched the removal provision in broad strokes then because the question of its scope was not before us. Now that it is, we speak more cautiously.

is to dismiss. If the action is not precluded, the federal court likewise has no jurisdiction to touch the case on the merits, and the proper course is to remand to the state court that can deal with it. In either event, as the Court of Appeals said, the district court's order comes because its adjudicatory power has been exercised and its work is done. But its adjudicatory power is simply its authority to determine its own jurisdiction to deal further with the case, see *United States* v. *Shipp*, 203 U. S. 563, 573 (1906) (opinion for the Court by Holmes, J.) (A federal court "necessarily ha[s] jurisdiction to decide whether the case [is] properly before it"). The work done is jurisdictional,[12]

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[12]The funds argue 15 U. S. C. §77p confers jurisdiction greater than that necessary to render the preclusion decision, analogizing §77p(c) to the federal officer removal statute, 28 U. S. C. §1442(a). If there is any colorable claim that an action is precluded, the argument goes, the district court can keep the case for adjudication, even after concluding on the merits that the state-law claims are not precluded; but because it has discretion to keep the case or remand to state court, a remand is not jurisdictional and hence is reviewable. The argument is flawed for two reasons. The District Court here did not indicate it thought there was any basis to keep the case for further development; right or wrong, it understood that it was making a jurisdictional ruling. Nor is the analogy with federal officer cases sound.

Section 1442(a) is an exception to the "well-pleaded complaint" rule, under which (absent diversity) "a defendant may not remove a case to federal court unless the plaintiff's complaint establishes that the case 'arises under' federal law." *Franchise Tax Bd. of Cal.* v. *Construction Laborers Vacation Trust for Southern Cal.*, 463 U. S. 1, 10 (1983) (emphasis deleted). The federal officer removal statute allows "suits against federal officers [to] be removed despite the nonfederal cast of the complaint," *Jefferson County* v. *Acker*, 527 U. S. 423, 431 (1999), and reflects a congressional policy that "federal officers, and indeed the Federal Government itself, require the protection of a federal forum." *Willingham* v. *Morgan*, 395 U. S. 402, 407 (1969). An officer's federal defense need be only colorable to assure the federal court that it has jurisdiction to adjudicate the case, see *Acker*, *supra*, at 431.

The funds assert that a preclusion defense need be only colorable as well, but the Act is different. It avails a defendant of a federal forum in contemplation not of further litigation over the merits of a claim brought

as is the conclusion reached and the order implementing it.[13]

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in state court, but of termination of the proceedings altogether, and a merely colorable claim of preclusion does not satisfy a district court that it may dismiss a case as precluded by the Act. There is no room for such a case to exist in a limbo of colorable preclusion: if a claim is precluded, it "may [not] be maintained," 15 U. S. C. §77p(b), and if the claim is not, the federal courts no longer have any business being involved, as there is no longer any federal question on which to moor the district court's jurisdiction. Nor has Congress expressed in the Act, as it did with 28 U. S. C. §1442(a), any policy of having particular suits tried in a federal court; there is no indication whatsoever in the Act that, apart from its purpose to preclude certain vexing state-law class actions, Congress intended to add other state-law cases to the federal dockets, and there is no apparent federal interest in spending time on such cases akin to the interest in adjudicating suits against federal officers.

[13]The funds suggest, in the alternative, that appellate jurisdiction in this case was proper under *Waco* v. *United States Fidelity & Guaranty Co.*, 293 U. S. 140 (1934). Without passing on the continued vitality of that case in light of §1447(d), we note that on its own terms it is distinguishable.

In *Waco*, a case was removed to federal court on an invocation of diversity jurisdiction, *id.*, at 141, and the District Court thereafter "entered a single decree embodying . . . separate orders." *Id.*, at 142. In one order, the District Court dismissed a cross-complaint against one party. In another, the District Court concluded that because of the dismissal there was no diversity of citizenship and it thus lacked jurisdiction, and so it remanded the case to state court. An appeal was taken from the order of dismissal. This Court determined that the appeal would lie, because "the decree of dismissal preceded that of remand," and because the District Court's order of dismissal was conclusive upon the parties. *Id.*, at 143. We noted that a "reversal [of the dismissal] cannot affect the order of remand, but it will at least, if the dismissal . . . was erroneous, remit the entire controversy, with the [previously dismissed party] still a party, to the state court for . . . further proceedings." *Id.*, at 143–144.

The order appealed in *Waco* was not a remand order; the order here is, and thus falls within §1447(d)'s bar on appeals of "[a]n order remanding a case" to state court. Moreover, the funds do not explain how to reconcile their argument with *Waco*'s acknowledgement that the order of remand "cannot [be] affect[ed]" notwithstanding any reversal of a separate order. *Id.*, at 143. The District Court's remand order here

III

We have yet to deal with ~~one~~ objection to our application of §1447(d), which if well-taken would be a serious one. The Seventh Circuit's reading of subsection (c) so as to treat the application of the preclusion rule as non-jurisdictional was in part motivated by its assumption that the Act gives federal courts exclusive jurisdiction to decide the preclusion issue. If that is so, and §1447(d) applies, a remand order based on a finding that an action is not precluded would arguably be immune from review. This is what the funds in effect contend here when they say that a district court's finding of no subsection (b) preclusion would collaterally estop the state court on remand; the district court would have the last word. And of course the funds' discomfort is made acute by our recent decision in *Dabit*, which expressly disavows the district court's limited view of the scope of subsection (b) preclusion.

But a district court does not have the last word on preclusion under the Act, for nothing in the Act gives the federal courts exclusive jurisdiction over preclusion decisions. A covered action is removable if it is precluded, and a defendant can enlist the Federal Judiciary to decide preclusion, but a defendant can elect to leave a case where the plaintiff filed it and trust the state court (an equally competent body, see *Missouri Pacific R. Co.* v. *Fitzgerald*, 160 U. S. 556, 583 (1896)) to make the preclusion determination.

And what a state court could do in the first place it may also do on remand; in this case, the funds can presently argue the significance of *Dabit* and ask for dismissal on grounds of preclusion when they return to the state court.

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cannot be disaggregated as the *Waco* orders could, and if the Seventh Circuit's preclusion decision stands, there is nothing to remand to state court.

Collateral estoppel should be no bar to such a revisitation of the preclusion issue,[14] given that §1447(d) prevents the funds from appealing the District Court's decision. See *Standefer* v. *United States*, 447 U. S. 10, 23 (1980) ("[C]ontemporary principles of collateral estoppel . . . strongly militat[e] against giving an [unreviewable judgment] preclusive effect" (citing Restatement (Second) of Judgments §68.1 (Tent. Draft No. 3, 1976)); see also Restatement (Second) of Judgments §28(1) (1980) ("Although an issue is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, relitigation of the issue in a subsequent action between the parties is not precluded [when t]he party against whom preclusion is sought could not, as a matter of law, have obtained review of the judgment in the initial action"). While the state court cannot review the decision to remand in an appellate way, it is perfectly free to reject the remanding court's reasoning, as we explained over a century ago in *Missouri Pacific Railway*: "[A]s to applications for removal on the ground that the cause arose under the Constitution, laws, or treaties of the United States," the finality accorded remand orders is appropriate because questions of this character "if decided against the claimant" in state court are "open to revision . . ., irrespective of the ruling of the [federal court] in that regard in the matter of removal." 160 U. S., at 583. Nor is there any reason to see things differently just because the remand's basis coincides entirely with the merits of the federal question; it is only the forum designation that is conclusive. Here, we have no reason to doubt that the state court will duly apply *Dabit*'s holding that holder

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[14]Modern usage calls for the descriptive term, "issue preclusion," in place of "collateral estoppel." But we are backsliders out of pity for the tired reader: "preclusion" by statutory fiat is enough preclusion for one opinion.

claims are embraced by subsection (b),[15] but any claim of error on that point can be considered on review by this Court. See *Franchise Tax Bd. of Cal.* v. *Construction Laborers Vacation Trust for Southern Cal.*, 463 U. S. 1, 12, n. 12 (1983) ("If the state courts reject a claim of federal preemption, that decision may ultimately be reviewed on appeal by this Court" (citing *Fidelity Fed. Sav. & Loan Assn.* v. *De la Cuesta*, 458 U. S. 141 (1982))).

IV

We hold that the Act does not exempt remand orders from 28 U. S. C. §1447(d) and its general rule of nonappealability. We therefore vacate the judgment of the Court of Appeals and remand the case with instructions to dismiss the appeal for lack of jurisdiction.

It is so ordered.

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[15] The parties further dispute whether the investors' claims satisfy the other 15 U. S. C. §77p(b) preclusion prerequisites, particularly the allegation of fraud: the investors take issue with the Seventh Circuit's characterization of their claims as charging fraud or manipulation, not mismanagement. Because the Court of Appeals lacked appellate jurisdiction, its reading of the investors' litigation position is not binding in future proceedings and is open to consideration on remand.

SUPREME COURT OF THE UNITED STATES

No. 05–409

CARL KIRCHER, ET AL., PETITIONERS *v.* PUTNAM FUNDS TRUST ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

[June 15, 2006]

JUSTICE SCALIA, concurring in part and concurring in the judgment.

I join the judgment of the Court, and Parts I, III, and IV of the Court's opinion; I do not join Part II for the reasons set forth below.

The District Court ordered these cases remanded to state court for want of jurisdiction. We know this because the orders say so: "Because the Court lacks subject matter jurisdiction, the Court **REMANDS** this action to the Madison County, Illinois Circuit Court." App. to Pet. for Cert. 27a; see also *id.*, at 30a, 40a, 46a, 51a, 57a, 64a. Even if those decisions were incorrect, the Court of Appeals lacked jurisdiction to review them because 28 U. S. C. §1447(d) bars appellate review of remand orders based on lack of subject-matter jurisdiction. See, *e.g.*, *Things Remembered, Inc.* v. *Petrarca*, 516 U. S. 124, 127–128 (1995). The Court correctly concludes that the Seventh Circuit's review of the remand orders overstepped its appellate authority. I disagree with the Court's reasoning in Part II, however, because it holds only that the Court of Appeals' recharacterization was incorrect, and not (as I believe) that recharacterization—being a form of review—is categorically forbidden.

The Court of Appeals rejected the District Court's description of its orders because it believed the District

Court had been too loose in its use of the term "jurisdiction." 373 F. 3d 847, 849–850 (2004). What the District Court *actually* did, the Court of Appeals concluded, was to remand on nonjurisdictional grounds (*not* subject to the appellate-review bar of §1447(d)) after deciding that petitioners' suits were not precluded. Such recharacterization seems to me flatly inconsistent with §1447(d). Under that section, an "order remanding a case to the State court from which it was removed *is not reviewable* on appeal or otherwise." *Ibid.* (emphasis added). But appellate review is exactly what is involved in looking behind the face of an order to determine its *true* basis: In order to reject a district court's own characterization, a court of appeals must decide, as the Seventh Circuit did here, that the district court was wrong. We have therefore held, in language that makes plain the correct outcome here, that "[i]f a trial judge *purports* to remand a case on the ground that it was removed 'improvidently and without jurisdiction,' his order is not subject to challenge in the court of appeal, by mandamus, or otherwise." *Thermtron Products, Inc.* v. *Hermansdorfer,* 423 U. S. 336, 343 (1976) (quoting §1447(c) (1970 ed.); emphasis added). Whether the District Court was right or wrong—even if it was so badly mistaken that it misunderstood the true basis for its orders—it *purported* to remand for lack of jurisdiction, and §1447(d) bars any further review.*

Review of the sort engaged in by the Court of Appeals threatens to defeat the purpose of §1447(d). As we recognized in *Thermtron Products,* the appellate-review bar was enacted "to prevent delay in the trial of remanded cases by

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*To say that we cannot recharacterize the District Court's remand for lack of jurisdiction is not to say that the basis for the remand is forever insulated from review. Part III of the Court's opinion makes clear that the underlying legal issue of preclusion remains open in state court, and need not be resolved in accordance with the (unreviewable) views of the District Court.

protracted litigation of jurisdictional issues." *Id.*, at 351. Such delay can be created just as easily by asking whether the district court correctly characterized the basis for its order as it can by asking whether that basis was correct—which even the Court of Appeals recognized was beyond its jurisdiction, 373 F. 3d, at 849. See also *Thermtron Products, supra*, at 343 (noting that §1447(d) "prohibits review of all remand orders [based on lack of subject-matter jurisdiction] whether erroneous or not"). The remand orders in these cases date back to early 2004; over two years later, federal courts are still engaged in appellate review.

The Court should end this delay by holding that appellate courts cannot look behind the stated basis for the district court's remand order. Instead, it concludes that "the District Court *was correct* in understanding its remand order to be dictated by a finding that it lacked removal jurisdiction." *Ante*, at 8 (emphasis added). It seems to me no more within our authority to declare the District Court's views correct than it was within the Court of Appeals' authority to reject them. Either decision is an exercise of appellate review barred by the plain terms of §1447(d).